(23,474)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 899.

J. BUTLER STUDLEY, TRUSTEE IN BANKRUPTCY OF THE COLLVER TOURS COMPANY, APPELLANT,

vs.

THE BOYLSTON NATIONAL BANK OF BOSTON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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1 United States Circuit Court of Appeals for the First Circuit, October Term, 1911.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,
v.
THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

District Court of the United States, District of Massachusetts.

No. 16686. In Bankruptcy.

In the Matter of THE COLLVER TOURS COMPANY, Bankrupt.

J. BUTLER STUDLEY, Trustee, Petitioner,
v.
BOYLSTON NATIONAL BANK, Respondent.

Petition to Recover Preferences.

[Filed May 2, 1911.]

J. Butler Studley, as he is trustee of the estate in bankruptcy of The Collver Tours Company, respectfully represents as follows:—

1. On or about January 24, 1911, the petitioner was duly appointed trustee in bankruptcy of the estate of The Collver Tours Company and duly qualified as such, under a petitioner filed against the bankrupt on December 16, 1910.

2. The respondent, Boylston National Bank, is a corporation duly organized under the laws of the United States, having its usual place of business in Boston in the County of Suffolk in the Commonwealth and District of Massachusetts.

2 3. The Collver Tours Company is now and on December 16, 1910, and at all times since August 1, 1910, and for a long time prior thereto was insolvent, and the aggregate of its property is not and was not at a fair valuation sufficient in amount to pay its debts.

4. The respondent, Boylston National Bank, on August 1, 1910, and for a long time prior thereto and at all times since August 1, 1910, knew and has known that the said The Collver Tours Company was and is insolvent as hereinbefore alleged.

5. On or about September 6, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on a note for five thousand (5000) dollars, and on or about

September 6, 1910, the respondent, The Collver Tours Company, had a bank deposit or account with the said Boylston National Bank amounting to upwards of $5000, and on or about said September 6, 1910, the Boylston National Bank took five thousand (5000) dollars of the said deposit and applied said sum upon the note of the said The Collver Tours Company then and theretofore due and payable to the Boylston National Bank, and the said The Collver Tours Company assented to the said application of the said funds, and the effect of the enforcement of the transfer of the said sum of five thousand (5000) dollars of the said account to the Boylston National Bank, The Collver Tours Company as heretofore alleged being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended thereby to give a preference to the said Boylston National Bank.

6. On or about September 12, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on a note for five thousand (5000) dollars, and on or about September 12, 1910, the bankrupt gave a check to the Boylston National Bank for five thousand (5000) dollars in payment
3 of the note of the bankrupt to the said Boylston National Bank then and theretofore due, and the effect of the enforcement of the transfer of the said sum of five thousand (5000) dollars to the Boylston National Bank, the said The Collver Tours Company as heretofore alleged being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended threby to give a preference to the said Boylston National Bank.

7. On or about September 20, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on a note for five thousand (5000) dollars, and on or about September 20, 1910, the bankrupt gave a check to the Boylston National Bank for five thousand (5000) dollars in payment of the note of the bankrupt to the said Boylston National Bank then and theretofore due, and the effect of the enforcement of the transfer of the said sum of five thousand (5000) dollars to the Boylston National Bank, The Collver Tours Company as heretofore alleged being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reason-

able cause to believe that it was intended thereby to give a preference to the said Boylston National Bank.

8. On or about September 30, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on a note for five thousand (5000) dollars and on or about September 30, 1910, the bankrupt gave a check to the Boylston National Bank for five thousand (5000) dollars in payment of the note of the bankrupt to the said Boylston National Bank then and theretofore due, and the effect of the enforcement of the transfer of the said sum of five thousand (5000) dollars to the Boylston National Bank, The Collver Tours Company as heretofore alleged being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended thereby to give a preference to the said Boylston National Bank.

9. On or about October 3, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boyston National Bank, on a note for twenty-five hundred (2500) dollars, and on or about October 3, 1910, the respondent, The Collver Tours Company, had a bank deposit or account with the said Boyston National Bank amounting to upwards of twenty-five hundred (2500) dollars, and on or about said October 3, 1910, the Boylston National Bank took twenty-five hundred (2500) dollars of the said deposit and applied said sum upon the note of the said The Collver Tours Company then and theretofore payable to the Boylston National Bank, and the said The Collver Tours Company assented to the said application of the said funds, and the effect of the enforcement of the transfer of the said sum of twenty-five hundred (2500) dollars of the said account to the Boylston National Bank, The Collver Tours Company as heretofore alleged being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended thereby to give a preference to the said Boylston National Bank.

10. On or about October 21, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on a note for five thousand (5000) dollars, and on or about October 21, 1910, the respondent, The Collver Tours Company, had a bank deposit or account with the said Boylston National Bank amounting to upwards of five thousand (5000) dollars, and on or about said October 21, 1910, the Boylston National Bank took five thousand (5000) dollars of the said

deposit and applied said sum upon the note of the said The Collver Tours Company then and theretofore due and payable to the Boylston National Bank, and the said The Collver Tours Company assented to the said application of the said funds, and the effect of the enforcement of the transfer of the said sum of five thousand (5000) dollars of the said account to the Boylston National Bank, the Collver Tours Company being as heretofore alleged insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said transfer constituted a preference, and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended thereby to give a preference to the said Boylston National Bank.

Wherefore the petitioner prays:

1. That the respondent, Boylston National Bank, may be made a party to this proceeding and may be ordered to repay to the petitioner the said several preferences received by the respondent,

September 6, 1910	$5000
September 12, 1910	5000
September 20, 1910	5000
September 30, 1910	5000
October 3, 1910	2500
October 21, 1910	5000
	$27,500

Together with interest on each preference from the time when the said preference was received.

6 2. That a subpœna or order of notice in the usual form may issue to the said respondent.

3. For such other and further relief as to this Honorable Court may seem meet.

J. BUTLER STUDLEY, *Trustee*,
By His Attorneys BRANDEIS, DUNBAR & NUTTER.

BRANDEIS, DUNBAR & NUTTER, *Solicitors*.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared the above named J. Butler Studley and made oath that he is informed and believes that the facts alleged in the foregoing petition are true. Before me,

ROMNEY SPRING,
Justice of the Peace.

Let Boylston National Bank be made a party to these proceedings and be ordered to appear and answer, and order of notice returnable Monday Rules May 8, 1911. OLMSTEAD, *Referee*.

Subpœna.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

To Boylston National Bank of Boston, in the County of Suffolk and said District, Greeting:

For certain causes, offered before the District Court of the United States of America, within and for the Massachusetts District, as a Court of Bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally be and appear before our said District Court to be holden at Boston, in said District, Monday, the eighth day of May, current, to answer to a petition exhibited against you in our said court, wherein J. Butler Studley, trustee in bankruptcy of Collver Tours Company, is petitioner and you are respondent; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

7

Witness, the Honorable Frederic Dodge, at Boston, this second day of May, A. D. 1911, in the one hundred and thirty-fourth year of the independence of the United States of America.

MARY E. PRENDERGAST,
Deputy Clerk.

MEMORANDUM.—The defendant is to enter his appearance in the suit in the referee's clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

Marshal's Return.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *May* 3, 1911.

I hereby certify that I have served the within subpœna by giving in hand to C. W. Bailey, vice-president of the within named Boylston National Bank, at No. 41 Bedford Street, Boston, this day, a true and attested copy of this precept.

GUY MURCHIE,
United States Marshal,
By J. H. WATERS, *Deputy.*

Fees:

Service	$2.00
Copy	.30
Travel	.12
	$2.42

Motion to Amend Petition.

(Filed December 15, 1911.)

J. Butler Studley, as he is trustee in bankruptcy of the estate of The Collver Tours Company, respectfully moves that he may be allowed to amend his petition against the Boylston National Bank to recover preferences, filed herein on or about May 2, 1911, as follows:

1. By adding thereto the following new paragraphs to the bill:

"11. The petitioner says that on September 8, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent, Boylston National Bank, on certain promissory notes, no
8 one of which was then due, aggregating the sum of twenty-five thousand dollars ($25,000), and at the opening of business on September 8, 1910, the said The Collver Tours Company had on deposit with the said Boylston National Bank a sum not exceeding six and 23/100 dollars ($6.23), and thereafter the said The Collver Tours Company made deposits with the said Boylston National Bank as follows:

September 10	$7,905.40
September 12	2,702.00
September 14	50.00
September 15	812.00
September 16	5,489.38
September 17	2,625.00
September 19	158.09
September 20	6,875.05
September 21	5,172.50
September 22	2,625.00
September 24	3,310.00
September 27	1,208.75
September 28	3,400.00
September 30	63.59
October 3	4,323.22
October 4	170.00
October 5	5,793.00
October 6	254.11
October 8	17,411.40
October 10	4,000.00
October 11	5,800.00

That on September 12, 1910, the respondent, the Boylston National Bank, took five thousand dollars ($5000) of the sum deposited with it by the said The Collver Tours Company and applied it upon one of the notes of The Collver Tours Company aggregating the said indebtedness of twenty-five thousand dollars ($25,000). On or about September 21, 1910, the said The Collver Tours Company gave a check to the respondent for five thousand dollars ($5000) in
9 payment of another of the notes of five thousand dollars ($5000) aggregating the said indebtedness of twenty-five

thousand dollars ($25,000). On September 30, 1910, the said The Collver Tours Company gave a check to the respondent for five thousand dollars ($5000) in payment of another of the notes of five thousand dollars ($5000) aggregating the said indebtedness of twenty-five thousand dollars ($25,000). On October 3, 1910, the respondent took twenty-five hundred dollars ($2500) of the sum deposited with it by the said The Collver Tours Company, and an additional amount unknown to the petitioner, and applied it in part payment of a note of five thousand dollars ($5000) and interest then due. On October 14, 1910, the said The Collver Tours Company gave a check to the respondent for five thousand dollars ($5000) in payment of another of the notes of five thousand dollars ($5000) aggregating the said indebtedness of twenty-five thousand dollars ($25,000). That all of the said sums so deposited by the said The Collver Tours Company were of funds belonging to it and not received from the said Boylston National Bank, except a sum of approximately twenty-five hundred dollars ($2500) deposited on or about October 3, 1910, which was the proceeds of a note of the said The Collver Tours Company discounted by the said Boylston National Bank on or about said October 3, 1910, the transaction being that one of the five thousand dollar notes of the Collver Tours Company held by the said Boylston National Bank fell due on said October 3d and one-half of it was paid and one-half renewed. And the petitioner says that the result of these several transactions was that on October 14, 1910, the indebtedness of the said The Collver Tours Company to said Boylston National Bank had been reduced from twenty-five thousand dollars ($25,000) to twenty-five hundred dollars ($2500), and the effect of the several transactions of deposits and payments as in this paragraph alleged, the said The Collver Tours Company being then insolvent, will be to enable the said Boylston National Bank to obtain a greater percentage of its debt against the bankrupt than any other creditor of the bankrupt of the same class, and the said several transactions and the transfers made thereby constitute a preference; and the Boylston National Bank, the person receiving the said preference and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended thereby to give a preference to the said Boylston National Bank, and that the said preference was created by the transactions described in this paragraph taken as a whole, and the said Boylston National Bank, the person receiving the said preferences and benefited thereby, and its agents acting therein, knew and believed and had reasonable cause to believe that it was intended by these several transactions taken together to give a preference to the said Boylston National Bank."

2. By adding to the prayers the following:

"1*a*. That the respondent, the Boylston National Bank, may be ordered to repay to the petitioner said preference received by the respondent, namely, the sum of twenty-two thousand and five hundred dollars ($22,500), received by it between September 6, 1910, and October 14, 1910, inclusive, as alleged in the eleventh paragraph of said petition, together with interest on this preference and

each portion thereof from the time when each preference and each portion thereof was received."

BRANDEIS, DUNBAR & NUTTER,
Solicitors for the Petitioner.

J. BUTLER STUDLEY.

December 15, 1911. This may be filed and allowed.

HOLLIS R. BAILEY,
Attorney for Boylston National Bank.

Filed and allowed December 15, 1911.

OLMSTEAD, *Referee.*

Motion to Amend Petition.

(Filed February 9, 1912.)

J. Butler Studley, as he is trustee of the estate in bankruptcy of The Collver Tours Company, respectfully moves that he may be allowed to amend his petition against the Boylston National Bank to recover preferences, filed on or about May 2, 1911, as follows:

11 By substituting for the words "that it was intended thereby to give a preference to the said Boylston National Bank," where they occur, to wit, in paragraphs 5, 6, 7, 8, 9, 10 and 11 of said petition as amended, the words "that the enforcement of such payment and transfer would effect a preference to the said Boylston National Bank."

By His Attorneys, BRANDEIS, DUNBAR & NUTTER.

Filed and allowed February 9, 1912.

JAMES M. OLMSTEAD, *Referee.*

Substituted Answer to Petition as Amended.

(Filed February 15, 1912.)

1. The respondent admits the allegations of paragraph 1 of the petition.

2. The respondent admits the allegations of paragraph 2 of the petition.

3. The respondent is ignorant as to the allegations of paragraph 3 of the petition and can neither admit nor deny the same, and must leave the petitioner to prove the same.

4. The respondent denies each and all the allegations of paragraph 4 of the petition.

5. The respondent admits that on or about September 6, 1910, The Collver Tours Company was indebted to it on a note for $5000 and that on or about September 6, 1910, the said company had a bank deposit or account with the respondent amounting to upwards of $5000. The respondent admits that on or about September 6, 1910, the respondent took $5000 of said deposit and applied said sum by way of set-off upon the note of the said company then due

and payable. The respondent says that it had a good and valid lien upon said bank deposit and had a good right to apply said sum by way of set-off in payment of said note; that the assent of said company to the application of the said funds was not needed and was not asked for. The respondent denies that said set-off
12 constituted a preference, and denies that it or its agents acting therein knew and believed and had reasonable cause to believe that the enforcement of such payment by way of set-off would effect a preference to the respondent. The respondent is ignorant as to the remaining allegations of said paragraph 5 and can neither admit nor deny the same, and must leave the petitioner to prove the same if material. And further answering said paragraph 5 the respondent says that on September 6, 1910, it made a loan to said company of $4987.50 by discounting a new note of $5000 given to it by said company on that day, and that the $5000 which was applied on September 6, as alleged in paragraph 5 of the petition, in payment of a note of that amount due on that day came substantially from the proceeds of said discount.

6. The respondent admits that on or about September 12, 1910, The Collver Tours Company was indebted to the respondent on a note for $5000 and that on or about September 12, 1910, said company gave a check to the respondent for $5000 on said deposit account and the respondent by way of set-off applied $5000 of said deposit in payment of said note, which note was then due. The respondent denies that said payment or transfer by way of set-off constituted a preference and denies that the respondent or its agents knew and believed and had reasonable cause to believe that the enforcement of such payment by way of set-off would effect a preference to the respondent. The respondent is ignorant as to the remaining allegations of paragraph 6 and can neither admit nor deny the same, and must leave the petitioner to prove the same if material.

7. The respondent admits that on or about September 20, 1910, The Collver Tours Company was indebted to the respondent on a note for $5000, and that on or about September 20, 1910, said company gave a check to the respondent for $5000 on said deposit account and the respondent by way of set-off applied $5000 of said deposit in payment of the said note which was then due. The respondent denies that said payment or transfer by way of set-off constituted a preference, and denies that the respondent or its agents acting therein knew and believed and had reasonable
13 cause to believe that the enforcement of such payment by way of set-off would effect a preference to the respondent. The respondent is ignorant as to the remaining allegations of paragraph 7 and can neither admit nor deny the same, and must leave the petitioner to prove the same if material.

8. The respondent admits that on or about September 30, 1910, The Collver Tours Company was indebted to the respondent on a note for $5,000, and that on or about September 30, 1910, the said company gave a check to the respondent for $5,000 on said deposit account and the respondent by way of set-off applied $5,000 of said deposit in payment of the note aforesaid which was then due. The

respondent denies that said payment or transfer by way of set-off constituted a preference, and denies that it or its agents acting therein knew and believed and had reasonable cause to believe that the enforcement of such payment by way of set-off would effect a preference to the respondent. The respondent is ignorant as to the remaining allegations of paragrph 8 of said petition, and can neither admit nor deny the same, and must leave the petitioner to prove the same if material.

9. The respondent admits that on or about October 3, 1910, The Collver Tours Company was indebted to it on a note for upwards of $2,500, and that on or about October 3, 1910, the said company had a general deposit account with the respondent amounting to upwards of $2,500, and that on or about October 3, 1910, the respondent took upwards of $2,500 of the said deposit account and applied said sum by way of set-off in payment of the note aforesaid. The respondent says that it had a good and valid lien upon said deposit account and a right of set-off and had a right to apply $2,500 of the same in payment of said note. The respondent says that the assent of The Collver Tours Company to such application was not required and was not asked. The respondent denies that the said application or set-off constituted a preference and denies that it or its agents acting therein knew and believed and had reasonable cause to believe that the enforcement of such payment by way of set-off would effect a preference to the respondent. The respondent is ignorant as to the remaining allegations of para-
14 graph 9 of the petition and can neither admit nor deny the same, and must leave the petitioner to prove the same if material.

10. The respondent denies each and all the allegations of paragraph 10 of the petition, and says that the petitioner is in error in alleging that the respondent held a note of $5,000 which matured on or about that date and that it applied $5,000 of the general deposit account of The Collver Tours Company in payment of the same. The respondent had a note of $5,000 which matured October 14 1910, and was paid on that date by applying $5,000 of the deposit account of said company.

11. The respondent for answer to paragraph 11, added by the first amendment to the petition, says as follows:—

The respondent admits that on September 8, 1910, the bankrupt, The Collver Tours Company, was indebted to the respondent on certain promissory notes, no one of which was then due, aggregating the sum of $25,000. It denies that at the opening of business on September 8, 1910, The Collver Tours Company had on deposit with the respondent a sum not exceeding $6.23, and says that as a matter of fact on that date the balance of the deposit account to the credit of said The Collver Tours Company was $3,054.66. It admits that thereafter the said The Collver Tours Company made deposits with the respondent as stated in said paragraph 11 during the period from September 8 to October 11, inclusive. The respondent says that besides said deposits said deposit account on September 28, 1910, was credited with the sum of $5.22 interest, and on October 3, 1910, was credited with the sum of $2,462.08, proceeds

of a note of The Collver Tours Company for $2,500 discounted on October 3 by the respondent. The respondent admits that on September 12, 1910, the respondent took $5,000 of the sums deposited with it by the said The Collver Tours Company (either with or without a check drawn for the amount) and applied the same by way of set-off upon one of the notes of The Collver Tours Company forming a part of the $25,000 indebtedness to it above mentioned. The respondent says that at the time said $5,000 was so applied said note of $5,000 was due and unpaid.

The respondent admits that on or about September 21,
15 1910, the respondent took $5,000 of the sums deposited with it by the said The Collver Tours Company (either with or without a check drawn for the amount) and applied the same by way of set-off upon one of the notes of The Collver Tours Company held by it as aforesaid. The respondent says that at the time said $5,000 was so applied said note held by it was due and unpaid.

The respondent admits that on or about September 30, 1910, the respondent (either with or without a check drawn for the amount) took $5,000 of the sums deposited with it by the said The Collver Tours Company and applied the same by way of set-off in payment of one of the notes held by it as aforesaid. The respondent says that at the time said money was so applied the said note was due and unpaid.

The respondent admits that on October 3 the respondent (either with or without a check drawn for the amount) took $5,000 of the sums deposited with it by the said The Collver Tours Company and applied the same by way of set-off upon one of the notes held by it as aforesaid. The respondent says that at the time said money was so applied said note was due and unpaid.

The respondent says that on October 3, 1910, it discounted for The Collver Tours Company a note of $2,500 and credited said deposit account with the proceeds of said discount, amounting to $2,462.08, this credit being additional to the credit of $4,323.22 mentioned in paragraph 11 of the amendment of the petition.

The respondent admits that on October 14, 1910, the respondent (either with or without a check drawn for the amount) took $5,000 of the sums deposited with it by the said The Collver Tours Company and applied the same by way of set-off in payment of one of the notes held by it as aforesaid. The respondent says that at the time said money was so applied said note was due and unpaid.

The respondent, upon information and belief, admits that all of the said sums so deposited by the said The Collver Tours Company during said period were of funds belonging to the said The Collver Tours Company, and were not received from the respondent except the sum of $2,462.08 credited on October 3, 1910, as the proceeds
of a note of $2,500 of the said The Collver Tours Company
16 discounted by the respondent on said October 3, 1910. The respondent admits that the transaction on October 3, 1910, was in substance that one of the $5,000 notes of The Collver Tours Company held by the respondent fell due on that day and the same was paid largely by the application by way of set-off of money deposited on that day by The Collver Tours Company, and partly out

of the money loaned to The Collver Tours Company on that day by the respondent by discounting a note for $2,500 as above set forth.

The respondent admits that the result of the several transactions occurring between September 8 and October 14 was that the indebtedness of The Collver Tours Company to the respondent was reduced from approximately $25,000 to approximately $2,500. The respondent denies that said payments or application of deposits or set-off of amounts due to said The Collver Tours Company from the respondent on said deposit account against the amounts coming due to the respondent from The Collver Tours Company on said notes constituted preferences. The respondent denies that it or its agents, acting thereunder, knew and believed or had reasonable cause to believe that such payments by way of set-off would effect a preference to the respondent.

12. And further answering the entire petition or bill as amended the respondent says that it had been doing business with the said The Collver Tours Company for a long time prior to August 1, 1910, and was informed and believed that the said company was doing a large and constantly increasing business, and was in every way responsible; that the said company during all this period in regular course of business kept its general deposit account with the respondent, and was constantly making deposits therein, some large and some small, upon all which deposits the respondent had a banker's lien for the payment of any indebtedness due to it from the said company, and had a right of set-off by which it was entitled to apply in payment of any debts due to it from said company any amounts due from the respondent to said company on said deposit account. The respondent says that said right of set-off existed independently of the financial condition of the said The Collver Tours Company, and was not affected by the fact.
17 if it be a fact, that the said company was at any of the times of the exercise of said right of set-off insolvent. And the respondent says that the exercise of its right of set-off aforesaid did not and could not constitute a preference within the meaning of the Bankrupt Act or any amendment thereof.

And the respondent further says that all applications of money by way of set-off made by it on account of said loans were made in the usual course of the business and without any knowledge or reasonable cause to believe that the same or any of the same constituted a preference or would have the effect to give a preference to the respondent. And the respondent further says that after August 1, 1910, the respondent made from time to time fresh loans to the said company, the amounts of which were credited to said company in its general deposit account aforesaid.

13. The respondent denies each and every allegation in the petition or bill as amended not hereinbefore specifically admitted, denied or answered.

THE BOYLSTON NATIONAL BANK
OF BOSTON,
HARRY W. CUMNER, *President.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

FEBRUARY 15, 1912.

I, Harry W. Cumner, being duly sworn, make oath and say that I have read the foregoing answer subscribed by me as president of the said Boylston National Bank, and know the allegations thereof, and that the same are true except as to the allegations made on information and belief, and as to those allegations I believe the same to be true.

HARRY W. CUMNER, *President.*

Subscribed and sworn to this fifteenth day of February, A. D. 1912, before me,

EDWARD A. CHURCH,
Justice of the Peace.

18 *Replication.*

[Received in Clerk's Office April 20, 1912.]

The plaintiff joins issue with the defendant upon its answer.
By His Attorneys, BRANDEIS, DUNBAR & NUTTER.

Petitioner's Requests for Findings of Fact.

[Filed February 12, 1912.]

The petitioner respectfully requests that the court make the following findings of facts:—

1. At all times after December 31, 1909, The Collver Tours Company was insolvent.

2. The Boylston National Bank as early as April 13, 1910, had actual knowledge that The Collver Tours Company was then insolvent.

3. The Boylston National Bank as early as April 13, 1910, had reasonable cause to believe that The Collver Tours Company was then insolvent.

4. As early as August 4, 1910, and at all times thereafter, the Boylston National Bank knew that the summer business of The Collver Tours Company had not been profitable and that the financial condition of The Collver Tours Company was not substantially better than it had been on April 13, 1910.

5. As early as August 4, 1910, and at all times thereafter, the Boylston National Bank had reasonable cause to believe that the summer business of The Collver Tours Company had not been profitable, and that the financial condition of The Collver Tours Company was not substantially better than it had been on April 13, 1910.

6. At the time of each payment in question, that is, September 12, September 20, September 30, October 3 and October 14, 1910, The Collver Tours Company was insolvent.

7. At the time of each payment in question, that is, September 12, September 20, September 30, October 3 and October 14, 1910, the Boylston National Bank knew that The Collver Tours Company was insolvent.

8. At the time of each payment in question, that is, September 12, September 20, September 30, October 3 and October 14, 1910, the Boylston National Bank had reasonable cause to believe that The Collver Tours Company was insolvent.

9. At the time of each payment in question, that is, September 12, September 20, September 30, October 3 and October 14, 1910, the Boylston National Bank knew that the enforcement of the transfer to it of the payment then made by The Collver Tours Company would effect a preference to the Boylston National Bank.

10. At the time of each payment in question, that is, September 12, September 20, September 30, October 3 and October 14, 1910, The Boylston National Bank had reasonable cause to believe that the enforcement of the transfer to it of the payment then made by The Collver Tours Company would effect a preference to the Boylston National Bank.

11. Each payment in question was made out of funds deposited by The Collver Tours Company with the Boylston National Bank within four months prior to the bankruptcy of The Collver Tours Company and deposited at times when the Boylston National Bank knew, or had reasonable cause to believe, that The Collver Tours Company was insolvent, and that any payment by The Collver Tours Company of its indebtedness to the Boylston National Bank would effect a preference to the Boylston National Bank.

12. The payments of September 12, September 20 and September 30, 1910, were each made by a check given by The Collver Tours Company and accepted by the Boylston National Bank.

By his Attorneys, BRANDEIS, DUNBAR & NUTTER.

Referee's Order.

February 21, 1912.

This petition to recover preferences came on to be heard, was argued by counsel and submitted on briefs, and upon consideration thereof it is hereby adjudged, ordered and decreed that said petition be and the same is hereby denied.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

Petition for Review by Judge.

[Filed February 28, 1912.]

To the Honorable James M. Olmstead, Referee in Bankruptcy:

The petition of J. Butler Studley, of Newton, in the County of Middlesex and Commonwealth and District of Massachusetts, as he is trustee of the estate in bankruptcy of The Collver Tours Company, respectfully shows:—

1. On or about the second day of May, 1911, the petitioner filed herein a petition against the Boylston National Bank to avoid certain preferences made by the bankrupt, The Collver Tours Company, to the said Boylston National Bank, and to recover from the Boylston National Bank the property transferred to it by The Collver Tours Company, or the value thereof; and said petition was thereafter amended on December 15, 1911, and February 9, 1912, and notice issued to the Boylston National Bank, and the Boylston National Bank appeared herein and on May 13, 1911, and January 11, 1912, filed answers to the said petition.

2. On January 18, January 19 and January 22, 1912, the said petition came on for hearing before the Honorable James M. Olmstead, referee aforesaid, and evidence was offered by both parties, and thereafter, on February 15, 1912, the said petition was argued in behalf of both parties.

On February 21, 1912, a decree or order was entered by the said James M. Olmstead, Esquire, denying the petition of the trustee against the Boylston National Bank.

3. The petitioner charges that in the proceedings before the said Honorable James M. Olmstead, referee, and in the said order or decree entered on February 21, 1912, there was error in that the said Honorable James M. Olmstead denied the petition of the said trustee that the said preferences made by the bankrupt, The
21 Collver Tours Company, to the Boylston National Bank be avoided and that the property transferred to the Boylston National Bank, or the value thereof, might be recovered by the trustee.

Wherefore the said trustee petitions that the said order or decree entered on February 21, 1912, may be reviewed by the Honorable Judge of the District Court, and that the referee may forthwith certify to the Honorable Judge of the District Court the question presented, the evidence relating thereto and the finding and order of the referee thereon.

J. BUTLER STUDLEY,
Trustee.

BRANDEIS, DUNBAR & NUTTER,
Of Counsel.

Certificate by Referee to Judge.

[Filed March 7, 1912.]

I, James M. Olmstead, one of the referees of said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:—

This was a bill or petition in equity to recover certain money payments made to respondent bank as preferences. The petition in bankruptcy was filed December 16, 1910; and adjudication thereon had January 9, 1911; on January 24, 1911, the trustee, Mr. Studley, was appointed, and on May 2, 1911, filed a petition to recover certain preferences, which petition was subsequently

amended. To such original and amended petition the respondent has filed complete answers. The facts which I find may be summarized as follows:—

The debtor was a Massachusetts corporation with a capital of $100,000, $75,000 of which was preferred, and $25,000 common stock, upon which a dividend of three per cent was declared February 1, 1910, payable May 12, 1910, on the preferred stock. It began to borrow money from the bank in 1907 and continued to do so until about November, 1911. The respondent gave it a line of discount amounting to $25,000. The business of The Collver Tours Company, as its name implies, consisted of managing
22 European and foreign tours. The year 1910 was the Ober-Ammergau year and the company issued circulars and gave the bank to understand that it expected a large profit from the business of this year. In addition to this it conducted what was known as "Round the World" business, from which it also expected and gave others to understand it was likely to derive large profits. The principal witness for The Tours Company was Mr. Frank R. Swain, who from 1906 to December 16, 1910, had acted as its clerk and later its assistant and general manager, having supervision of the books and business of the concern and with a power of attorney to negotiate loans and sign checks. He testified that on January 20, 1910, the liabilities of the concern to the bank had been reduced to $10,000, and they continued at that figure until July 7 and 14, when loans of $5000 respectively were negotiated. From this time until November, when the bank ceased to make further loans, notes were paid or renewed as they came due, and the balances varied from time to time, but their fluctuations were not of unusual amount or sufficient to cause any particular alarm on the part of the bank.

During the summer of 1910 Mr. Collver was abroad, returning some time in September. The large business had devolved exclusively on Mr. Swain, who testified that he did not know the European business at that time had not been profitable, but was beginning to believe it. There was introduced in evidence as an exhibit a tabulation of the notes, discounts and payments. When a note came due it was sometimes paid or reduced by the deposit on hand, and in several instances checks were given to meet the notes as they fell due. Mr. Swain testified that between April and September 12 there was an increase in the value of the good-will of the business; that between April and September the liabilities were increasing and so were the assets; that he did not know at the time he testified what the condition was in September and that it was not discovered until the assignment made just before the petition in bankruptcy was filed that the company could not pay its bills. In addition to the regular deposit account with the Boylston Bank a letter of credit system had been created in 1909 through the agency of Brown Brothers and the Boylston National Bank, and as
23 this business increased it was divided between the Boylston and another bank.

Mr. Leon Collver, president and treasurer of the company, testified that at the end of November Mr. Swain and he had an interview with Mr. Cumner, the president of the bank, at his private

place of business, at which interview Mr. Cumner stated it was impossible to grant their requests for further funds. Shortly prior thereto Mr. Swain and Mr. Collver had called at the bank and in an interview with the president and Mr. Bailey, the assistant cashier, had stated that they did not need any further funds. Mr. Herbert B. Bailey, the assistant cashier, testified that he only knew in a general way how the business was conducted, and in describing the dealings of the bank with The Tours Company explained that it was the custom to offset the account with the note when it came due, just as they did with all their customers; that the deposits made by The Tours Company were treated in the regular way; that there was no belief that any preference was contemplated and that they treated this account in the same way as other accounts.

Mr. Harry W. Cumner, president of the bank, testified of the knowledge that the bank had of the "Round the World" and Ober-Ammergau business, and the assurances given the bank that the loans would be paid in the fall; that the line of discount went right on at the rate of $25,000 until November; that the account was a regular one in the regular course of business and subject to checks. He alluded to the interview of October 14 when Mr. Collver and Mr. Swain were sent for to get a statement, and at which time they stated that they did not need any further money; that he had no reasonable cause to believe that the bank was getting any preferences. On cross-examination he testified that he refused a loan of $5000, which was an extra or outside of the $25,000 limit; that their usual balance ran regularly in the summer and renewals were made in the summer and September of 1910, and that it was only after the interview with Mr. Collver that he asked for more money, and only in November that he heard rumors that the business was not successful. No evidence was introduced of attachments against The Tours Company on the part of creditors.

24 Counsel for the complainant introduced a statement or return made at the State House in the spring of 1910, which showed apparent losses. Mr. Swain explained that these losses were apparent rather than real owing to a change in the methods of bookkeeping. It is also to be borne in mind that such statement, in view of the new definition of insolvency contained in Section 1 of the act, are not so material as formerly, when the rule was that a debtor was insolvent if he could not immediately cash his liabilities when presented.

After hearing the arguments of learned counsel and a consideration of their exhaustive and able briefs, I entered a decree dismissing the bill.

Turning now to the law applicable to the facts as found, I am of the opinion that this case is governed by the rule of law in the department of preference as laid down by the Supreme Court of the United States in the cases of Grant v. National Bank, 97 U. S. 80, and Stucky v. Masonic Savings Bank, 108 U. S. 74, in which under the former Bankruptcy Act the law was determined that a creditor must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency and that it was not sufficient that he had some cause to suspect such insolvency. If

this case is to be governed by Section 68 of the act and is the subject of set-off, then it appears to be determined by the cases cited in the brief of learned counsel for the bank.

New York County Bank v. Massey, 192 U. S. 138.
Demmon v. Boylston Bank, 5 Cush. 194.

A large part, however, of the brief of learned counsel for the complainant and cases cited in support of his contention are devoted to a demonstration that this is not a case of set-off. Conceding therefore his contention for the sake of argument, I proceed to consider whether the complainant has made out a case of preference under the terms of the present act as amended. At the outset it is to be observed that the element of an active intent on the part of the debtor is now eliminated by the changed language of Section 60*b* of the act as amended by the act of June 25, 1910. The language in the act as amended now is "and the judgment or transfer then operate as a preference," and, again, "shall have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." In other words, this change in the language was intended to alter the law, as set forth in

Hardy v. Gray (C. C. A.), 144 Fed. 922.

Conceding therefore that the complainant need not now show an active intent on the part of The Tours Company to prefer this creditor, and also conceding that in the summer of 1910 The Tours Company was insolvent, although the evidence is by no means conclusive that its officers knew or believed this to be the fact, there remains the consideration of the important element of reasonable cause to believe on the part of the creditor that the enforcement of these payments, either by check or otherwise, would effect a preferrence. I have found from the facts that the bank and its officers dealt with The Tours Company in the regular course of trade and took payments and made discounts up to a certain limit in the same manner as with other customers; that while the bank was cautious in its dealings, it was not put upon inquiry by any circumstances calculated even to arouse its suspicion. To my mind the most that can be said in favor of the complainant's contention is that the bank may have had occasion from some rumors or statements to have been suspicious of the condition of The Tours Company. Although this doctrine of suspicion as laid down in Grant v. National Bank, supra, has been criticised by an able judge in Stern v. Paper, 183 Fed. 228, 234, I am satisfied that it is still good law, and in support of this view I desire to cite the following cases which to my mind embody the true principles applicable to the decision of this case, and in several of which the facts bear strong resemblances to those of the instance case:—

In re Wolfe Co., 164 Fed. 448 (affirmed by C. C. A.), 174 Fed. 589;
Tumlin v. Bryarr (C. C. A.), 165 Fed. 166;
Hamilton Nat. Bank v. Balcomb (C. C. A.), 177 Fed. 155;
Powell v. Gate City Bank (C. C. A.), 178 Fed. 609, 617.

26 Without undertaking to reconcile or discuss the various cases cited in the learned briefs of counsel and relying on the above citations, which with one or two exceptions are not to be found in the briefs of counsel, I arrived at the conclusion that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the bank amounted to preferences.

And the said question, together with a record embodying the evidence, as requested by the parties, together with the briefs of learned counsel, is certified to the judge for his opinion thereon.

Dated at Boston, the second day of March, A. D. 1912.

JAMES M. OLMSTEAD,
Referee in Bankruptcy.

Order of the District Court.

June 19, 1912.

At Boston, in said district, on the nineteenth day of June, A. D. 1912, upon the question certified to the court by the referee in said matter on the seventh day of March, A. D. 1912, now therefore, after hearing arguments of J. Butler Studley, Esq., trustee, and Hollis R. Bailey, Esq., counsel for the Boylston National Bank, creditor, and after due consideration of the same:

It is hereby ordered and decreed that the order of the referee dismissing the trustee's petition to recover preferences be and it hereby is affirmed.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness the Honorable Frederic Dodge, judge of said court, and the seal thereof, this nineteenth day of June, A. D. 1912.

MARY E. PRENDERGAST,
Deputy Clerk.

27 *Opinion of the District Judge.*

June 19, 1912.

DODGE, *J.*:

The payments to this bank which the trustee seeks to recover back as preferences voidable under Section 60*b* of the Bankruptcy Act were on September 12, 20 and 30, October 3 and 14, 1910. The payments were of $5000 each, except that of October 3, which was of $2500. Adjudication was on January 9, 1911, under an involuntary petition filed December 16, 1910, the act of bankruptcy charged being a general assignment by the bankrupt on December 9, 1910.

Each of the payments was from funds which had been from time to time deposited by the bankrupt to its own credit, and subject to its own checks, in a deposit account which it had maintained with the bank since 1906. Each payment was of a note which had previously been given to the bank by the bankrupt and which fell due at the time of the payment. The payments of September 12, 20

and 30 were each made by the bankrupt's check upon the deposit account referred to, given at the time by it to the bank for the purpose. In the case of the payments on October 3 and 14 the bank itself charged up the amount due on the note against the deposit account without asking the bankrupt's consent, but with its acquiescence, thus paying itself the amount due on the note without the use of any check to effect the payment.

In June, 1907, the bank discounted two notes of $2000 each for the bankrupt, which were paid from its deposit account in October, 1907. In February, 1908, it had discounted three notes amounting in all to $3500, which were paid in like manner in September and October, 1908. In 1909, under an agreement to give the bankrupt a "line of discount" amounting to $25,000, it discounted notes amounting to $15,000 in April, $10,000 in May, $10,000 in July and $500 in September. Of these notes $25,000 in all were renewed during the year as they became due, and $10,500 in all were paid. Beginning with May 12, 1909, the total amount of these notes outstanding during the remainder of the year was at no time less than $25,000, and for a time in September, 1909, it stood
28 at $25,500. Under a similar agreement, new notes amounting to $25,000 in all were discounted during 1910 at various times up to and including August 4, notes to the same amount were renewed at various times to and including September 6, and notes to the same amount were paid from the deposit account at various times up to and including July 22; the total amount of notes outstanding being $25,000 in February, 1910, rising to a maximum of $30,000 in April, falling to a minimum of $10,000 on June 20, and standing at $25,000 between August 4 and September 6, inclusive. The successive payments claimed to be preferences reduced this amount after September 6 from $25,000 to $2500, there being one note for that amount, given October 3, 1910, outstanding after the payment of October 14. Exhibit 2, presenting in detail the dates and amounts of all the discounts, renewals and payments during the entire period from June, 1907, to and including October 14, 1910, may be referred to.

The deposit account above referred to began in 1906 and was continued up to December 2, 1910, a week before the general assignment mentioned, when it was closed on the books of the bank. It was at all times a regular general deposit account, subject to check by the bankrupt in ordinary course. Its state from day to day during the time of its continuance is shown by transcripts from the bank's books (Exhibits 13 and 14), and is below further referred to.

The trustee contends that the bankrupt company was insolvent during September and October, 1910, that the bank knew or is chargeable with knowledge of the insolvency, that the payments in question necessarily operated as preferences and that the bank had reasonable cause to believe that they would so operate. If all this is true and if the payments must be regarded as "transfers" within the meaning of Section 60*b* as amended in June, 1910, the trustee has the right under that section to avoid them and recover them back. On behalf of the bank it is contended, (1) that none of the payments can be considered "transfers" by the bankrupt of its property,

within the meaning of the section referred to; because, in the case of each, the bank had and properly exercised a right to set
29 off its claim upon the note against its debt to the bankrupt for the amount then held by it on deposit. (2) That even if the payments be considered "transfers" within the meaning of Section 60*b*, and transfers necessarily operating as preferences, no reasonable cause on the bank's part to believe that any of the payments would so operate has been proved.

(1) With regard to the first of these contentions on the bank's part, there is no dispute that as soon as the bankruptcy petition had been filed the bank would have been entitled, under Section 68*a* to set off against the trustee's claim for funds then on deposit the amount due it upon any unpaid note then held by it. As has appeared, the last of these payments was two months before the bankruptcy, and in view of this fact the trustee contends that Section 68*a* does not apply. It gives no such right of set-off, according to him, at any time before the bankruptcy. In N. Y. &c. Bank v. Massey, 192 U. S. 138, the set-off claimed by the bank and decided not to be a preference was a set-off of an amount due the bank when the petition was filed, on the bankrupt's note then held by it, against the amount to the bankrupt's credit in its deposit account when the petition was filed,—it was claimed when the bank proved its claim in the bankruptcy proceedings,—and it was not based upon any application made before the bankruptcy of funds in the deposit account to the payment of the note. The trustee contends that the decision affords no authority for the proposition that a set-off so effected is sanctioned by Section 68*a*.

The Court of Appeals for this circuit, however, in Lowell v. International &c. Co., 158 F. R. 781, held that a bank which had applied funds in the bankrupt's deposit account to pay demand notes held by it had received no preference, but had lawfully exercised its right of set-off, although its action in thus applying the funds from the deposit account was taken before there were any proceedings in bankruptcy. As appears from 158 F. R. 782, the application of the funds was made on April 27. The bankruptcy petition was filed, as appears by reference to the complete record, on July 9 following. The court was unable to distinguish the case from N. Y. &c. Bank v. Massey, and in referring to Re George N. Hill Co., 130
30 F. R. 315, decided by the Court of Appeals for the Seventh Circuit, where the creditor bank had taken payment out of the deposit account two days before the filing of the bankruptcy petition, the fact that N. Y. &c. Bank v. Massey had been none the less regarded as controlling by that court was commented on. 158 F. R., pp. 783, 784.

I must regard Lowell v. International &c. Co. as settling the law for this circuit. The subsequent decisions, Irish v. Citizens &c. Co., 163 F. R. 880, Re Perlhefter, 177 F. R. 299, which the trustee cites, are both of them District Court decisions in other circuits, and notwithstanding anything in them to the contrary or any reasoning tending to the conclusion that N. Y. &c. Bank v. Massey does not apply when the creditor bank has undertaken to make such a set-off before the bankruptcy, I must follow Lowell v. International &c.

Co. as controlling upon me and as requiring me to regard the set-off here claimed as valid and therefore not a transfer within the meaning of Section 60*b*. See also Booth v. Prete, 81 Conn. 636; Chicago &c. Co. v. Bank, 192 F. R. 967. Whether payment of any of the notes was made by check given by the bankrupt upon the deposit account or by charging up the amount of the note against it, seems to me immaterial in the present case. If a check was given, it must be taken to have effected nothing more than might have been effected without it, under the understanding of the parties, as indicated by the course of dealing between them since 1906. There is nothing to show any course of dealing or any understanding between them, during the period referred to, different in any respect from that which is usual and regular between a bank and a depositor to whom it is extending credit, nor is there anything to show that the bank did more, in the case of either payment, than stand upon its right of set-off. A fraudulent or collusive intent to accomplish a preference through transactions ordinary and regular so far as outward appearances go, as by accumulating funds in the deposit account for the better security of the bank, might well be held to prevent the application of Section 68*a*, but I find no indication of any such purpose underlying what was done in the present case.

31 Lowell v. International &c. Co. and the cases relied on therein deal with Section 60*b* as it stood before the amendments of June 25, 1910, and while a preferential transfer was not voidable under it unless the creditor had reasonable cause to believe a preference intended by the bankrupt. The substituted requirement of 1910 is only that the creditor should have had reasonable cause to believe that the enforcement of the transfer would effect a preference; and the trustee contends that this change in the provisions of the act renders the above decisions no longer in point. Section 68*a*, however, remains unaffected by the aamendments of 1910, and the decisions referred to, as I understand them, preceed upon the ground that Section 68*a*, in its application to transactions between a bank and its depositor, like those here in question, prevents them from being regarded as effecting "transfers" of the bankrupt's property within the meaning of Section 60*b*. Unless such a transfer was effected, the provisions of Section 60*b*, whether those contained in it before June 25, 1910, or those which it now contains, have no application to what was done in the case of either note referred to when it was paid in the manner described.

(2) If, however, the above conclusion is wrong, and the payments here in question must be treated as "transfers" within the meaning of Section 60*b*,—the trustee has to show, in order to avoid them as preferences under that section as it now stands, that the bankrupt was insolvent when they were made, that they operated to give the bank a greater percentage of its debt than any other creditor of the same class and that the bank had reasonable cause to believe, in the case of each payment, that it would effect this result.

It seems to have been assumed on the part of the trustee that if the bankrupt was in fact insolvent during the time covered by the payments, and if the bank knew this to be the case or can be

charged with such knowledge, everything necessary for the trustee's purposes has been shown. But, as appears from what has been stated, no one of these payments enabled the bank to get the whole of what would have been the bankrupt's total debt to it, supposing the bankruptcy to date from the time of the payment; and
32 the evidence seems to me, in any case, insufficient to charge the bank with knowledge, as to any payment, that it was thereby obtaining a greater percentage of its debt than any other creditor of the same class could obtain, under a distribution as of the time of the payment. It does not appear that no other creditors were being paid when these payments were made, or that none were paid afterward. On the contrary the bankrupt remained a going concern for some weeks after the last payment on October 14, 1910, during which time, as Exhibits 13 and 14 show, its transactions were numerous, and its checks for various sums, by no means all of them inconsiderable sums, were paid almost daily from the deposit account referred to.

If, however, under the assumption now being made, it be also true that the trustee's contention regarding these payments is established, provided only that he proves knowledge on the bank's part, when they were made, of facts sufficient to put a reasonably prudent business man on inquiry as to the bankrupt's financial condition, and thus to charge the bank with knowledge of all that reasonable diligence in inquiry on its part would have disclosed to it, I am obliged to hold the evidence sufficient for this purpose and to decide in the trustee's favor. I think the evidence requires the conclusion that the bankrupt's admitted insolvency would have been ascertained by due use of that right to investigate the company's affairs and that opportunity for such investigation which belonged to the bank by virtue of the fact that the company was a depositor to whom it was granting large credit. It may well have been that reliance upon a supposed right of set-off to which it might at any time resort led the bank to suppose no such investigation necessary on its part. But if it be true that no such right of set-off existed, so that such reliance had no support in law, and if the bank's position must be regarded as not differing, at the time of each payment, from that of an ordinary creditor who receives full payment of his debt, the facts shown to have been within its knowledge seem to me such as to put it upon inquiry.

The leading facts important for this purpose may be thus stated:
The bank had before it recent statements of assets and liabili-
33 ities, made to it by the bankrupt. These showed insolvency unless the good-will of the business which the bankrupt was conducting was to be taken at a valuation much larger than I think a reasonably prudent business man would have attached to it upon careful examination. Upon these statements the bank had lent the bankrupt, in the spring of 1910, $5000 more than the $25,000 agreed upon as the ordinary limit of its credit. To the bank's knowledge, the anticipated profits from the summer tourist season of 1910 were being relied on as the source from which the $30,000 loan was to be repaid. As the season advanced and before September 12, when the first payment in question was made, it had come

to the bank's knowledge that these anticipations could not be realized. Although the indebtedness of $30,000 existing in April was reduced to $10,000 by June 20, it stood again at $25,000 on August 4 by reason of loans of $5000 on July 7, $5000 on July 14 and $10,000 on August 4, less a payment of $5000 on July 22. At $25,000 it stood until the first of the payments in question on September 12,—three renewal notes of $5000 each being given meanwhile upon the maturity of earlier notes on August 16 and September 6. It was the failure of the profits anticipated from the summer business which compelled the bankrupt to renew instead of paying the three notes last mentioned, and of this fact the bank had knowledge. Late in August or the early part of September an urgent request for a loan of $5000 in addition to the $25,000 outstanding was refused. The renewal on September 6 was because $2800 only stood to the bankrupt's credit in the deposit account and it had no other funds available. The daily balances to its credit after September 6 became much more frequently small or insignificant in amount, and funds deposited after that date consisted, as the bank knew, mainly of advance payments made to the company upon contracts which it would have to perform and of which the ultimate returns would be long delayed. The payment received by the bank October 3 was partial payment of a note for $5000 which the company could not meet in full and which it was forced to renew for $2500. It is true that the company had in previous years ultimately
34 met all its notes to the bank, though at times with difficulty, also that in previous years the deposits made by it had decreased in amount during July and August, also that its deposit account, even after September 6, 1910, continued, generally speaking, while the company remained a going concern, to show balances of considerable amount to its credit. But all this seems to me insufficient to overcome the conclusions I have drawn from the conditions existing and shown to have been within the bank's knowledge in the spring of 1910, and thereafter.

The view I take of the case, however, as stated under (1) above, requires me to agree with the referee's final result. His order dismissing the trustee's petition is therefore approved and affirmed.

Claim of Appeal.

[Filed June 28, 1912.]

J. Butler Studley, as he is trustee in bankruptcy of The Collver Tours Company, feeling himself aggrieved by the order or decree made and entered herein on or about June 19, 1912, dismissing the said trustee's petition for review of the referee's order dismissing the petition brought by the trustee against the Boylston National Bank to recover back alleged preferences, and approving and affirming the said order of the referee, does hereby appeal from such order or decree to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers on which said de-

cree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the First Circuit.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for J. Butler Studley, Trustee in Bankruptcy of the Estate of Collver Tours Company.

June 28, 1912.

The foregoing claim of appeal is allowed.

FREDERIC DODGE,
District Judge.

35 *Assignment of Errors.*

[Filed June 28, 1912.]

J. Butler Studley, as he is trustee in bankruptcy of the estate of The Collver Tours Company, says that in the record and proceedings of the said District Court in the above matter and in the final order or decree made and entered therein on June 19, 1912, there is manifest error, and for causes thereof the said trustee assigns that the court erred in the following:—

1. The court approved and affirmed the order of the referee dismissing the petition of the said trustee against the Boylston National Bank to recover preferences.

2. The court denied the petition of the said trustee that the order of decree entered by the referee on February 21, 1912, dismissing the said trustee's petition against said Boylston National Bank be reviewed.

3. In not directing the referee that the payment of $5000 to the Boylston National Bank of September 12, 1910, was a preference within the Bankruptcy Act which the trustee had a right to recover, and in not directing that the referee's order of February 21, 1912, should be reversed so far as it related to this payment.

4. In not directing the referee that the payment of $5000 to the Boylston National Bank of September 20, 1910, was a preference within the Bankruptcy Act which the trustee had a right to recover, and in not directing that the referee's order of February 21, 1912, should be reversed so far as it related to this payment.

5. In not directing the referee that the payment of $5000 to the Boylston National Bank of September 30, 1910, was a preference within the Bankruptcy Act which the trustee had a right to recover, and in not directing that the referee's order of February 21, 1912, should be reversed so far as it related to this payment.

6. In not directing the referee that the payment of $2500 to the Boylston National Bank of October 3, 1910, was a preference within the Bankruptcy Act which the trustee had a right to recover, and in not directing that the referee's order of February 21, 1912, should be reversed so far as related to this payment.

36 7. In not directing the referee that the payment of $5000 to the Boylston National Bank of October 21, 1910, was a preference within the Bankruptcy Act which the trustee had a right

to recover, and in not directing that the referee's order of February 21, 1912, should be reversed so far as it related to this payment.

8. The court ruled as a matter of law that the payments in question were not to be regarded as "transfers" within the meaning of Section 60*b* of the Bankruptcy Act of 1898 as amended in June, 1910.

9. The court ruled as a matter of law that Section 68*a* of the Bankruptcy Act of 1898 was applicable to set-off made prior to the filing of a bankruptcy petition.

10. The court ruled as a matter of law that Section 68*a* of the Bankruptcy Act of 1898 was applicable to set-offs made by the Boylston National Bank on its claims against The Collver Tours Company more than two months before any bankruptcy petition was filed against The Collver Tours Company.

11. The court held that the transaction by which $5000 was paid to the Boylston National Bank by the Collver Tours Company on September 12, 1910, was a set-off within Section 68*a* of the Bankruptcy Act of 1898.

12. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on September 20, 1910, was a set-off within Section 68*a*. of the Bankruptcy Act of 1898.

13. The court held that the transaction by which $5000 was paid to the Boylston National Bank by the Collver Tours Company on September 30, 1910, was a set-off within Section 68*a* of the Bankruptcy Act of 1898.

14. The court held that the transaction by which $2500 was paid to the Boylston National Bank by The Collver Tours Company on October 3, 1910, was a set-off within Section 68*a* of the Bankruptcy Act of 1898.

15. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on October 21, 1910, was a set-off within Section 68*a* of
37 the Bankruptcy Act of 1898.

Wherefore the said trustee prays that the said decree of the District Court, dated June 19, 1902, may be reversed, and that the District Court may be directed to enter a decree that the referee may be instructed that the transfers by the Collver Tours Company of $5000 on September 12, 1910, $5000 on September 20, 1910, $5000 on September 30, 1910, $2500 on October 3, 1910, and $5000 on October 21, 1910, were each preferences that may be avoided by the trustee in these proceedings, and that the Boylston National Bank be ordered to repay each of said sums to the trustee with interest thereon from the date of the payment of each sum.

By His Attorneys, BRANDEIS, DUNBAR & NUTTER.

Bankrupt's Schedules of Assets.

[Filed January 11, 1911.]

Schedule B.—Statement of all Property of Bankrupt.

Schedule B. (1) Real Estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value. $ c.
None.	.....	.....	None.
Total,			

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

Schedule B. (2) Personal Property.

		$ c.
a.—Cash on hand.	All the property of the Bankrupt corporation was transferred to Robert E. Buffum assignee by assignment for benefit of creditors recorded Dec. 9, 1910. See Sch. B 4 which includes cash turned over to assignee.	
38		
b.—Bills of exchange, promissory notes, of securities of any description (each to be set out separately).	One share of stock in Chamber of Commerce standing in name of Leon Collver but property of Bankrupt, turned over to assignee and not sold by him	200
c.—Stock in trade in business of ....., at..... ....., of the value of		None None
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.:		25
e.—Books, prints, and pictures, viz.:		None None
f.—Horses, cows, sheep, and other animals (with number of each), viz.:		None None
g.—Carriages and other vehicles, viz.:		
h.—Farming stock and implements of husbandry, viz.:		

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i.—Shipping and shares in vessels, viz.:		None
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.:	See Sch. B 4 which includes cash obtained from sale of furniture.	
39		
l.—Patents, copyrights, and trade-marks, viz.:	Jinrikisha trade mark	NoVal
m.—Goods or personal property of any other description, with the place where each is situated, viz.:	Mailing lists, cabinets correspondence etc. at the Berkeley Building until sold by Receiver & names the Boston Travel Society Journeys & Collver Tours Company,	600
	Total,	625

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

Schedule B. (3) Choses in action.

		$ c.
a.—Debts due petitioner on open account.	None	None
b.—Stocks in incorporated companies, interest in joint-stock companies, and negotiable bonds.	None	None
c.—Policies of insurance.	None	None
d.—Unliquidated claims of every nature, with their estimated value.	Claim against American Express Co.	145
e.—Deposits of money in banking institutions and elsewhere.	Deposit in Boylston National Bank under attachment of C. T. Raven.	50
	Total	

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

40 Schedule B. (4).

Property in Reversion, Remainder, or Expectancy, Including Property Held in Trust for the Debtor or Subject to Any Power or Right to Dispose of or to Charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest. $ c
Interest in land.	None	None
Personal property.	None	None
Property in money, stock, shares, bonds, annuities, etc.	None	
Rights and powers, legacies and bequests.	None	
	Total	None

Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed. $ c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	All property of Bankrupt Corporation was transferred to Robert E. Buffum, 1045 Tremont Bldg., Boston, Mass., by an assignment for benefit of creditors dated Dec. 8, 1910. Turned over to Receiver by Assignee.	1422 80
41		
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	Paid to Bates, May & Abbott for services rendered in the collection of claim of $1900 from Brown Bros. and for services in connection with common law assignment or bankruptcy proceedings.	300
	Total	1422 80

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

Schedule B. (5).

A Particular Statement of the Property Claimed as Exempted from the Operation of the Acts of Congress Relating to Bankruptcy, Giving Each Item of Property and its Valuation; and, if Any Portion of it is Real Estate, its Location, Description, and Present Use.

		Valuation $ c.
Military uniform, arms, and equipments.	None	None
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.	None	None
	Total	

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

42 Schedule B. (6).

Books, Papers, Deeds, and Writings Relating to Bankrupt's Business and Estate.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason of their custody of the same.

Books.	Ledger, cash book petit cash, letter credit journal
Deeds.	None
Papers.	Correspondence

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *Treasurer.*

Oath to Schedule B.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

On this Tenth day of Jan. A. D. 1911, before me personally came Leon Collver, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

[SEAL.] ROBERT E. BUFFUM,
Notary Public.

43 *Appearance for Respondent.*

[Filed May 8, 1911.]

Enter my appearance for Boylston National Bank in J. Butler Studley, Trustee, v. Boylston National Bank. Petition to recover alleged preferences.

GEORGE F. PIPER,
Attorney for Boylston National Bank.

Appearance for Respondent.

[Filed May 13, 1911.]

STUDLEY, Trustee,
vs.
BOYLSTON NATIONAL BANK.

In the above case I appear with G. F. Piper, Esq., for the respondent, the Boylston National Bank.

HOLLIS R. BAILEY,
19 *Congress Street, Boston.*

Withdrawal of Appearance for Respondent.

[Filed May 16, 1911.]

J. BUTLER STUDLEY, Trustee,
v.
BOYLSTON NATIONAL BANK.

In the above-entitled cause I withdraw as attorney for Boylston National Bank and the clerk is requested to enter my withdrawal on the record of the case.

GEORGE F. PIPER,

Appointment, Oath and Report of Appraisers.

[Filed January 9, 1911.]

It is ordered that Gabriel E. Beekman, of Boston, Charles J. Brown, of Boston, and Henry L. Burnham, of Boston, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said alleged bankrupt and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness the Honorable Frederic Dodge, judge of said court, and the seal thereof, at Boston, in said district, on the twenty-eighth day of December, A. D. 1910.

MARY E. PRENDERGAST,
Deputy Clerk.

44 DISTRICT OF MASSACHUSETTS, *ss:*

Personally appeared the within-named Gabriel E. Beekman, Charles J. Brown and Henry L. Burnham and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

GABRIEL E. BEEKMAN.
CHARLES J. BROWN.
HENRY L. BURNHAM.

Subscribed and sworn to before me this twenty-ninth day of December, A. D. 1910.

ELBRIDGE G. DAVIS,
Justice of the Peace.

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:—

	Dollars.	Cents.
(1) Cash	$1,419	30
(2) Two large letter files and card files and one small card file	30	.00
(3) Correspondence, mailing lists and trademarks and names used in connection with the business	570	.00
(4) Miscellaneous personal property, including pictures, stationery, duplicator, old typewriter, four cheap chairs, desk, etc.	25	.00
(5) Two shares of stock Boston Chamber of Commerce standing in name of Leon Collver, Certificate No. 1029	200	.00
	$2,244	.30

In witness whereof we hereunto set our hands, at Boston, this twenty-ninth day of December, A. D. 1910.

G. E. BEEKMAN.
CHARLES J. BROWN.
HENRY L. BURNHAM.

45 *Final Report of Receiver.*

[Filed January 28, 1911.]

To the Honorable James M. Olmstead, Referee in Bankruptcy:

I, Robert E. Buffum, receiver in this proceeding, do hereby report as follows:—

That on the twenty-third day of December, 1910, I was appointed receiver herein at the request or upon the assent of a number of the largest creditors of said bankrupt. The purpose of said receivership was to have certain assets of a perishable nature converted into cash. Previous to my appointment as receiver I had been acting as an assignee under a common law assignment in the usual form given to me on December 8, 1910. The bankrupt is a corporation incorporated under the laws of Massachusetts in 1905, and was engaged in conducting tours, especially around the world. At the time of the assignment there were some five of these parties traveling in different parts of the world, consisting in all of about thirty-five members. As assignee I caused the conductors of these various parties to be notified by cable of the insolvent condition of the company. At the time this assignment was made I am informed that the company had been attempting to borrow capital to complete these tours, but without success. It became necessary to go into bankruptcy or make an assignment. These tourists, constituting a substantial part of the total indebtedness, could not be informed fully in regard to the situation, nor could the affairs be placed immediately in their charge. It is obvious that, under the circumstances, many matters required immediate attention; consequently an assignment was made. Soon after my appointment as assignee I notified the lessors of the offices in the Berkeley Building, and at once the lease was terminated by them and I was notified to quit under the provisions of this lease. It therefore became necessary to either remove the furniture or have it sold to the best advantage. As assignee I secured a number of bids and at length sold the greater part of the furniture in bulk to the highest bidder, Lewis J. Bird & Company. A few things were sold to the best ad-

46 vantage possible, and the mailing lists, correspondence, books, etc., were removed to a smaller office in the building at a reduced rental.

There was turned over to me as assignee, besides the cash referred to in my account as assignee, one share of stock in the Chamber of Commerce of the par value of $200, the furniture, correspondence, mailing lists, and I am informed and believe all of the assets of the said corporation.

As assignee I sent written notice to all of the creditors separately informing them of the assignment and in a general way the condition of affairs. Many inquiries were made by different creditors and many letters were received from the friends of the different members of the parties, to which letters I sent answers giving the best information possible. These matters of necessity required a great deal of time and attention.

When the bankrutpcy petition was filed I was informed that if th lists and correspondence were allowed to remain idle it would mea that they would depreciate in value and might sell for little or noth ing after a few weeks; consequently, it seemed to be my duty a assignee to obtain various offers for the lists and correspondenc which I did. The following concerns made offers in writing fo these lists, correspondence, etc., contingent upon a prompt accep ance: Raymond & Whitcomb Company, Dunning & Company Bureau of University Travel. When these offers were received submitted them to the attorney for the petitioning creditors an consulted with the other largest creditor in this vicinity. In orde that these offers might be taken advantage of, I was appointed re ceiver and at once had an appraisal made of the assets of the con cern, after which I attempted to have these offers increased, bu without success, and took advantage of the highest offer, namel $600, from the Bureau of University Travel, for the correspondenc lists and names and cabinets.

Since appointed receiver there have been numerous requests fo information, which have been answered; conferences with creditor etc., all of which have taken a good deal of time.

I am turning over to the trustee in bankruptcy $1704.52 and a the remaining assets which have come into my hands whic
47 have not been sold, including a number of pictures, som office stationery, one share of stock in the Chamber of Com merce, a claim against the American Express Company for betwee $140 and $150, and a few other things of little or no value.

ROBERT E. BUFFUM, *Receiver.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *January* 27, 1911.

I, Robert E. Buffum, the receiver herein, do hereby make solem oath that the statements of fact contained in the above report a true to the best of my knowledge, information and belief.

ROBERT E. BUFFUM, *Receiver.*

Subscribed and sworn to before me this twenty-seventh day January, 1911.

ELBRIDGE G. DAVIS,
Justice of Peace.

48 TESTIMONY BEFORE REFEREE.

Olmstead, Referee.

Appearances:

J. Butler Studley, Esq., pro se.
Hollis R. Bailey, Esq., and George F. Piper, Esq., for Boylsto National Bank.

Evidence for the Petitioner.

Mr. STUDLEY: This is a petition brought by myself as trustee of The Collver Tours Company, a bankrupt in this court, against the Boylston National Bank to recover a preference. The petition was filed May 2, 1911. The date of the petition in bankruptcy is December 16, 1910; adjudication January 9, 1911, No. 16,686; name of case, The Collver Tours Company. I was appointed trustee on January 24, 1911, and qualified on the same day.

The COURT: Petition for preference is dated when?

Mr. STUDLEY: Undated, but filed May 2, 1911, in this court, and order of notice was issued returnable May 8, 1911.

The COURT: I understand there is no question of jurisdiction raised?

Mr. BAILEY: That appears in the answer,—I have waived that.

[Petition of trustee read by Mr. Studley. Answer of respondent read by Mr. Studley.]

The COURT: Why isn't this proceeding plenary?

Mr. STUDLEY: It is in my judgment, if your Honor please, but all objections on that ground are waived.

The COURT: Yes; but I want it understood this is a plenary sitting, because there is no jurisdiction of the District Court, either held by judge or referee, unless the sitting is plenary. Being an appearance and answer with all the formality of a bill in equity, it seems to me it becomes plenary.

Mr. BAILEY: I think so, your Honor.

The COURT: The referee is the court.

49 Mr. BAILEY: I understand.

The COURT: I understand all questions of that kind are waived?

Mr. BAILEY: Yes, your Honor.

The COURT: We will assume that since the O'Brien case the referee is supposed to be acting in his official position as court and not as master, so it may be regarded as plenary.

Mr. BAILEY: Yes. I am not quite sure that the O'Brien case had been fully reported last spring.

Mr. STUDLEY: I filed December 15, 1911, an amendment to the petition which, without stating any new facts, alleges facts in a somewhat different way.

Mr. BAILEY: It has almost the appearance of a substitute bill or petition, but otherwise it is two counts in the same cause of action,—I assume it is the same action?

Mr. STUDLEY: I should want to allege the facts in both forms, and if I may recover on either I wish to do so.

[Amendment to petition read by Mr. Studley. Respondent's answer to amendment read by Mr. Studley.]

Mr. STUDLEY: The pleadings I think, your Honor, state the situation sufficiently. I should like to make a very short opening, however. The Collver Tours Company was engaged in the tourist business. It was a Massachusetts corporation and was organized in 1905 to take over the business formerly conducted by Mr. Collver per-

sonally. I think it had a nominal capital of $100,000, but substantially all the stock that was issued was issued against the goodwill of Mr. Collver's business. The corporation was not especially successful from the start, and as early as June, 1907, began to borrow money from the Boylston National Bank, but in 1907 it never borrowed at one time, or had outstanding at any time, more than $4000. Its loans were paid off in the fall of 1907. In 1908 its borrowing from the Boylston Bank reached $6500 at one time, all of which was paid off in the fall of 1908. In 1909 the corporation was allowed to borrow at one time from the Boylston National Bank $25,000, and that loan was not reduced below $25,000 at any time after July, 1909, but it was renewed from time to time and stayed at the fixed amount of $25,000 in the latter part of 1909
50 and the early part of 1910. In 1909 the corporation The Collver Tours Company had had a very bad year and had lost nearly $45,000.

The COURT: Are you going to claim the bank had any knowledge of it?

Mr. STUDLEY: It so appeared in their report to the Massachusetts Commissioner of Corporations which was on file at the State House in March, and an abstract of that report of its condition showing that loss of $45,000—a deficit of that amount—was shown to the officers of the bank on or about April 10th, 1910, as your Honor may recall, was the year that the Ober-Ammergau Passion Play was given, and it was believed that year would be a very great year in the tourist business. The Collver Tours Company, which had been indebted in the sum of $25,000 to the Boylston National Bank since July 1909, without any reduction being made in the account at all below $25,000 at any time, in April, 1910, applied for an additional loan from the Boylston Bank and as I shall show, this statement showing the very heavy loss during the preceding year was shown at that time to the officers of the bank, and the statement also showed that even taking the good-will and the other assets at their book value the corporation was badly insolvent. On the strength of the prospective Ober-Ammergau business—the European tourist business for the summer of 1910—the bank officials decided to let the company have $5000 more money, or a total of $30,000, on the express understanding that the loan would be reduced to $10,000 by July 1st and be entirely extinguished by either the first of August or some time in August, 1910, it being the expectation of the officers of the bank, knowing as they did the insolvent condition of the company, that the European business would be profitable and that the loans which had run since July, 1909, would be extinguished by the profits of that business. The European tourists, as the officers of the bank well knew—as I shall show—paid their moneys in advance, that is, they paid the expense of their tours to The Collver Tours Company in advance before they started on their tours, and with the moneys that came from them the loan was reduced to $10,000 on June 20—reduced from $30,000
51 to $10,000 on June 20—and it remained at $10,000 until July 7, 1910. It then appeared that although the European

tourists had substantially all paid up their money in full and substantially all the European tourists had departed for their tours, that The Collver Tours Company did not have enough money to take these European tourists about and it had to have more money, and the loan was increased from $10,000 by $5000 on July 7th to $15,000 and by $5000 more on July 14th to $20,000. This was reduced a few days by a payment of $5000 on July 22d to $15,000, and then raised again on August 4th to $25,000. By that time it was obvious to the officers of the company—and I think I shall show to the officers of the bank also—that the European tourist business had been either without any return—either conducted without profit or loss—or else—which was probably the fact—an absolute loss, and instead of these loans having been reduced and extinguished by the first of August as the arrangement had been in April on which exception was made and the increase to $30,000 allowed, that the loan was at the old figure of $25,000 and no more money was coming in from the European business, and the European business was over.

Then The Collver Tours Company had a second kind of business, which prior to 1910 had been its principal business, that is, taking tourists around the world, the tours beginning either some time in the fall or early winter of each year, and these tourists, who paid very large sums, paying $2500 apiece for their tours and sometimes more, began to make deposits for round the world business in the fall of 1910. Then the bank, although earnestly requested, refused to make a new loan and insisted that those notes which were outstanding should be paid as they fell due—some of them were extended for short periods, but except for one extension—that extension of $2500 referred to in the pleadings, made on October 3d—no note was extended after, I think, September. This was a renewal of $5000. After that no note was renewed and the bank insisted on each note being paid, and if not paid the bank itself took it out of the funds. The bank knew at that date, as I shall show, that the corporation was insolvent, and had actual knowledge of the insolvency from a date as early as April 13, 1910, and I think previous to that, and the notes were paid by The Collver Tours Company only under the assurances—which were I think not binding contracts—that they should be given moneys by the bank to finance these tourists who were starting on their trips around the world, or who paid in their moneys in advance for trips around the world. The loan was reduced from $25,000 to $2500. Then no more money was forthcoming, and it was only a matter of weeks or days before the corporation assigned. The assignment was made early in December—the date of the petition is December 16, when the only assets the corporation had amounted to $2,442.80 and its admitted liabilities at that time $48,935.88. The bank by this process had been paid substantially in full; its loan of $25,000 had been paid substantially all except $2500, and the other creditors have a possible dividend of from one to three per cent. These are the facts in short which I expect to prove.

The COURT: Do you mean to say that a bank can be guilty of receiving a preference? It is a singular coincidence that this whole question arose in a case against the Boylston Bank. I have in mind the case of Denham against the Boylston Bank. Isn't it a case of set-off and not a preference?

Mr. STUDLEY: It seems not to me, your Honor.

The COURT: There is a decision of the United States Supreme Court on this subject—the Massey case. I have just decided a similar case where Judge Dodge sustained me,—the Percy Ford case.

Mr. STUDLEY: I think our case is not within either one of these.

The COURT: I don't think the Supreme Court cites the Denham case, but it is settled law under insolvency law. I notice a little inaccuracy, if I may so term it, Mr. Studley, in your pleadings. You will notice that this proceeding was brought since the amendment of 1910, June 25. Now the language of that amendment is somewhat different from what it was up to that time. You evidently assume that there must be reasonable cause to believe that a preference was intended. Now, the law has been made a little easier for you by that amendment. The Circuit Court of Appeals
53 in a case which I can't recall, decided—erroneously I think—that an intention was necessary. That is eliminated. A supreme court higher than the Supreme Court of the United States, to wit, Congress, has altered the law, not in conformity with that decision, so that "reasonable cause to believe" still remains. That has to be shown. But it is the effect—reasonable cause to believe that such payments would be in effect the enforcement of a preference. I thought I would call your attention to that. I assume that your pleadings should conform to the language of the act, and I don't believe Mr. Bailey will object to an amendment if that is necessary.

Mr. BAILEY: I should want to also amend my answer, your Honor.

The COURT: I think counsel should pardon my calling your attention to that change in the phraseology of the act. I hope you may be able to distinguish your case from the Massey case, that is, I hope for your sake—I want to see justice done. I would suggest that you direct your energies to show that this is not a case of set-off within this decision, but rather is a preference. I don't mean to say there are not certain circumstances under which banks may make a preference.

Mr. STUDLEY: There is at least one distinction in this case. In the Massey, set-off was not exercised until after the petition was filed. The transaction did not become complete until after the petition was filed. Here everything took place two months before the petition was filed.

The COURT: There may be a good deal in that contention.

Mr. BAILEY: I have some authorities on that.

The COURT: The statute doesn't limit set-off to a subsequent period. Section 68 refers to a set-off within four months, which would naturally be before the petition. I don't believe there is any

very great difference in facts here,—it seems to me you could almost agree upon your facts in the case.

Mr. BAILEY: Your Honor noticed I was quite liberal in admitting facts, but of course I don't for a moment admit or expect my brother is going to prove what he is hoping because it is contrary to what I am informed, but then I may be taken by surprise.

54 The COURT: It seems to me a great mass of details here should be admitted, but the question of insolvency and reasonable cause—this naturally would be the subject of evidence and proof.

Mr. BAILEY: I shall be glad to co-operate in any reasonable way to shorten the case.

The COURT: Instead of going into proof by the books of the bank of these various transactions, it seems to me that could all be avoided.

Mr. BAILEY: I may say right here for your Honor's information and for Mr. Studley's information that I have had taken off from the books of the bank since these loans began a transcript, and within a reasonable compass you can run your eye right down it day by day, showing deposits for each day.

The COURT: From the beginning of their transactions?

Mr. BAILEY: As to loans; they had a deposit some two years before they began borrowing.

The COURT: What is the date of the first item?

Mr. BAILEY: June, 1907; that is before any loan began, and coming down from there day by day, and your Honor can run your eye right down.

The COURT: You could tabulate that briefly. Perhaps Mr. Studley will look that over and agree.

Mr. BAILEY: Glad to have him verify it. I have also here a list of the notes, showing the notes and the time they ran. I thought that documentary evidence would help quite a little.

The COURT: If you could address yourself in the evidence to the question of insolvency and reasonable cause to believe, we will make progress.

Mr. STUDLEY: I didn't suppose there was any contention about the insolvency, but I will go ahead on that basis.

FRANK P. SWAIN (sworn).

(By Mr. STUDLEY:)

Q. 1. What is your name?

A. Frank P. Swain.

Q. 2. And your residence?

A. Georgetown, Massachusetts.

Q. 3. And your age, Mr. Swain?

A. Twenty-eight.

55 Q. 4. Your present occupation?

A. Music publisher.

Q. 5. Are you now in any way connected with any of the parties in this case, either the Boylston Bank or The Collver Tours Company, or with me?

A. No.

Q. 6. You were at some time connected with The Collver Tours Company?

A. Yes.

Q. 7. During what period?

A. From 1906 until the date of insolvency.

Q. 8. In what capacity?

A. Part of the time as clerk, and later as assistant manager and finally as general manager.

Q. 9. And what connection did you have with the financial affairs of the company?

A. I discussed them with Mr. Collver as the president of the company and acted under his authority.

Q. 10. What connection did you have with the books of the company?

A. I had general supervision.

Q. 11. Did you keep the books yourself?

A. I did not, except for part of the time,—from soon after I entered the employ of the company until about 1908, when we employed a bookkeeper.

Q. 12. Were they then kept under your direction?

A. They were.

Q. 13. Did Mr. Collver himself have anything to do with the keeping of the books?

A. No; he received most of his information through me.

Q. 14. What, in general, was the business of The Collver Tours Company?

A. Conducting of parties.

Q. 15. What kind of parties?

A. I don't understand.

Q. 16. It was the business of taking tourists about the world, or to various places in the world?

A. It was.

Q. 17. And how did it do that business; send people around with them as conductors?

A. Yes.

Q. 18. Did it pay their expenses; take them around for a fixed sum; cover particular tours for a fixed sum?

Mr. BAILEY: If there was a general practice—may have been different.

Q. 19. Won't you state in general?

A. A certain sum was charged for the entire tour and an agreement was made to carry them over a certain specified itin-
56 erary, as outlined in our catalogues, for that sum. Of course there were special rates allowed us by the hotels and transportation companies in addition to the commissions, and the profit was the difference between the cost of carrying out the trip and the price which we charged.

Q. 20. Was there any settled practice as to when the tourists paid for these trips?

A. It was generally understood to be one month before the advertised sailing date.

Q. 21. And your profit, as you said, came from the difference between what it cost you to take the tourists around and what they paid you for the various tours?

A. Yes.

Q. 22. You had your usual place of business in Boston here?

A. We did.

Q. 23. Were you familiar with the condition of The Collver Tours Company in 1909?

A. Yes.

Q. 24. Did you make up a statement as of December 31, 1909?

A. Yes, I did.

Q. 25. Is this a copy of the statement (showing witness paper)?

A. Yes, that is a copy if it was taken from the statement on file at the State House.

Q. 26. That appears to be certified, you notice, on the back?

A. Yes.

Mr. BAILEY: I object to that, except so far as may hereafter be connected with the bank.

The COURT: I will admit it de bene.

[Exhibit 1. Statement of The Collver Tours Company as of December 31, 1909, admitted de bene.]

Mr. STUDLEY: This is a statement of the assets and liabilities of The Collver Tours Company, "Certificate of Condition," as of December 31, 1909; filed on March 31, 1910. Signed by Ethel B. Collver, described as a director; Leon Collver, president and treasurer, and I. R. Collver, described as a director, and verified by them before Mr. Swain as notary on March 24, 1910. This is a copy attested by the Secretary of the Commonwealth (Exhibit
57 1). This shows:

Assets:		
Office fixtures	$1,850.00	
Foreign offices	4,500.00	
Cash and debts receivable	32,090.87	
Good-will	34,700.00	
Profit and loss	44,896.65	
		$118,037.52
Liabilities:		
Capital stock	$41,100.00	
Accounts payable	76,937.52	
		$118,037.52

Q. 27. I call your attention to this item of "Good-will $34,700." Do you know how that valuation was arrived at, Mr. Swain?

A. That was on the books when I entered the employ of the company.

Q. 28. You entered the employ of the company in 1906, you say?

A. I think it was 1906.

Q. 29. Was that valuation changed, after you entered the employ of the company, on the books?

A. No; it was the same. That was the amount given at the time of incorporation, and it was already incorporated when I entered the employ of the company.

Q. 30. I call your attention to the item "Profit and loss $44,-896.65." What does that item mean?

A. It was the loss on the business, although I think it may have been that year—or may have been the previous year; I could not tell without looking at the books—that I changed the method of bookkeeping and made the year close December 31st, instead of some time in May, when it had been closed before, in order to begin the year January 1st. Previous to that the year had ended after the completion of the round the world tours, which was usually in June, but after embarking in the European business as well it seemed desirable to have the year end December 31st, and accordingly that change was made and the books appear to show a greater loss than was true.

Q. 31. Does that item indicate that the assets of the corporation were less than the liabilities by that sum of $44,896.65, taking these assets given there as assets and these liabilities given there as liabilities?

58 Mr. BAILEY: Isn't that rather apparent from the statement itself?

Mr. STUDLEY: If you concede it is, I will not press the question.

Mr. BAILEY: I suppose that is the balance.

Mr. STUDLEY: If it is conceded that is what it means, I will not press the question.

Mr. BAILEY: What I am saying is that—that these assets stated there are less than these liabilities stated there.

Mr. STUDLEY: That is all I want to bring out on that point.

The COURT: Should you say, from your knowledge of the affairs of the company and an inspection of that return, whether the company did business in 1909 at a profit or a loss?

A. It did business at a loss, although not as great as shown there on account of the change in the method of bookkeeping, but nevertheless there was a loss.

Q. 32. Of your own knowledge do you know anything about that item "Foreign Offices $4500," distinguishing between your own knowledge and hearsay?

A. Yes; the item is represented by various payments made on account of our Japanese office.

Q. 33. Were those payments made by you?

A. Most of them; yes.

Q. 34. Now, what was the nature of those payments?

A. They were for various expenses, such as rent and other items of maintenance, but were allowed to remain on the books as assets, after deducting a certain amount, and represented the so-called value to us,—to the business,—of the Japan office. It had a certain value.

Q. 35. Was that value in the nature of the good-will of the Japan end of the business?

A. Yes, it was.

Q. 36. Did that sum of $4500 represent any tangible physical assets, so far as you know?

A. So far as I know, it did not.

Q. 37. Take this item "Office fixtures $1850." What did that represent?

A. Furniture in the office—I couldn't say what else, but it covered the furniture and fixtures contained in our home office.

Q. 38. And how was that figure of $1850 arrived at, do
59 you know?

A. By payments from time to time for new furniture, with certain deductions each year for depreciation.

Q. 39. Do you know what amounts had been taken off for depreciation? A. I couldn't say without looking at the books. It is shown on the books.

Q. 40. Is it a matter you could find quickly by looking at the books?

A. Well, I can say that about one-quarter of the amount which had been spent each year was deducted—about 25 per cent as I remember.

Q. 41. Now, do you recall the amount of the indebtedness of the corporation to the Boylston Bank outstanding on January 1, 1910? A. I do not.

Mr. BAILEY: (Produces statement.) We shan't dispute those figures.

[Statement offered by Mr. Studley and marked "Exhibit 2." Statement of the loans made by Boylston National Bank to The Collver Tours Company from June 14, 1907, to October 14, 1907, inclusive.

This statement appears on page 122 [printed page 150] of this record.]

Q. 42. It appears from Exhibit 2—this statement made by the Boylston National Bank—that on April 1, 1910, the indebtedness of The Collver Tours Company to the Boylston Bank was $25,000. Do you recall that 1910 was the year of the Passion Play at Ober-Ammergau?

A. Yes.

Q. 43. Did your company conduct a European summer business prior to 1910?

A. The year before it did; that is, the summer of 1909.

Q. 44. To what extent?

A. I think the total business amounted to less than thirty people; in fact it was very small.

Q. 45. What plans had been made in regard to the summer business of 1910?

A. Preliminary circulars were prepared and issued, as I remember, late in the summer of 1909.

Q. 46. Were any negotiations had with the Boylston National

Bank in the spring of 1910 in regard to loans, negotiations
60 that you had personal knowledge of?

A. I cannot remember just what negotiations were had or by——

Mr. BAILEY: That question is only what you know of.

A. I repeat I find it hard to remember, because there were so many of them that I am confused in the various dates, but by seeing the books I could tell. If you will simply remind me of the dates of any renewals I can tell.

Q. 47. You may look at this schedule of notes if you wish, Exhibit 2.

A. [Looking at Exhibit 2.] There appears a renewal dated February 14th, which I do not remember negotiating myself. I think possibly that was taken care of by Mr. Collver merely as a matter of form—I don't think there was any discussion at that time.

Mr. BAILEY: You see that sort of a question, why he is giving us what he surmises probably took place. He said he didn't recall.

Q. 48. You are to answer only what matters you know of your own knowledge and not what you heard from others.

A. The first negotiations that I actually recall them would be April 13 1910.

Q. 49. Now, what took place on April 13, 1910?

A. I had a talk with Mr. Cumner and Mr. Bailey.

Q. 50. Who is Mr. Cumner?

A. President of the Boylston National Bank.

Q. 51. Who is Mr. Bailey?

The COURT: Not this Mr. Bailey—H. R.?

Mr. BAILEY: There are three Baileys in this case.

Q. 52. Who was Mr. H. B. Bailey?

A. Assistant cashier of the Boylston National Bank.

Q. 53. Where did you see these gentlemen?

A. At the bank.

Q. 54. What other person, if any, besides Mr. Cumner, Mr. Bailey and yourself were present?

A. I think that was all, unless Mr. Church might have been there: but I don't think he was.

Q. 55. Was Mr. Collver there?

A. That was after Mr. Collver left for Europe.

61 Q. 56. What was the occasion of your seeing these gentlemen?

A. To arrange to have a note discounted.

Q. 57. Go ahead and state in your own language what was said and done at that time.

A. I applied to them for funds and they were reticent about giving them at first, but it was necessary—absolutely necessary at that time, and I——

Mr. BAILEY: Now, there again, your Honor, he is not telling what was said or done.

The COURT: I think it is a part of the conversation. He may describe the circumstances.

A. As the demand for funds was urgent I tried to convince them that we would be able to repay before the middle of August, that is, to repay them out of the profits of the summer European profits .

Mr. BAILEY: I don't wish to be unnecessarily troublesome, your Honor, and yet I do believe that if the witness does try to tell what he said and what they said it would be better.

The COURT: What Mr. Bailey wants you to give to us is the conversation. If you can't remember the exact words, why give us the substance.

A. The substance was I promised, or rather showed them, that we were to receive sufficient payments inside of six weeks to fully cover the amount of the additional loan, and I believe at that time I submitted to them the statement of the condition of the business for the year ending December 31, 1909. However, they were apparently satisfied, because I received the money. That is about all that I can recall that actually happened.

The COURT: In connection with this transaction?

A. In connection with this transaction.

The COURT: Is there any other your memory can be refreshed on?

A. Well, I saw them on several occasions, in fact on the occasion of every renewal.

Mr. Studley asks for the statement given the bank.

Mr. BAILEY: I don't find it. Willing you shall use a copy.

62 Mr. STUDLEY: The original had the handwriting of one of the Messrs. Bailey on it.

Mr. BAILEY: I don't find it.

[This was later produced and marked "Exhibit 4."]

Q. 58. Is this paper which I hand you, marked at the bottom "Collver, April '10" copy of the paper which you submitted at that time?

A. I should say it was.

[Offered by Mr. Studley and marked "Exhibit 3." Statement of April, '10, not signed and not dated.]

The COURT: Was this statement shown on April 13th?

A. I think it was shown on that date.

Mr. STUDLEY: I desire to call your Honor's attention at this time that this statement shows the same deficit as of December, 1909, namely $44,896.65, as was shown on the certificate of condition filed at the State House.

Q. 59. Now, I wish to ask you whether there was any mention made at this talk you had with Mr. Bailey and Mr. Cumner of this deficit as of December, 1909?

A. I do not recall that anything was said about it.

Q. 60. Was anything said about the good-will which is valued in this statement at $34,700?

A. No; in fact very little was said about the statement. I merely left that for them to inspect.

Q. 61. Was it read in your presence?

A. Not very thoroughly I should judge.

Q. 62. Did you have with you at that time any figures showing your European business?

A. Yes.

Q. 63. What discussion was there, if any, about that?

A. I merely presented them to convince them we would be able to repay the notes, and I think on the face of that statement they were satisfied that we would be able to do so.

[Adjourned at 4 p. m.]

BOSTON, MASS., *January* 19—10.30 a. m.

Mr. BAILEY: Your Honor, I was asked yesterday to see if I could find the original paper that the witness Swain referred to as the statement which he thought was shown the bank people in
63 April, and I produce a paper which perhaps is that and the witness may be able to identify it.

Q. 64. I hand you this paper marked at the bottom "Collver April 1910," and ask you if you recognize it?

A. Yes; I gave that to Mr. Cumner during the interview on, I think, April 13th.

Q. 65. In whose handwriting is the body of that?

A. It is my own.

Q. 66. Who prepared that?

A. I did.

Mr. STUDLEY: Now, I offer that to be substituted for Exhibit 3 which was introduced yesterday.

The COURT: Leave it in and make another exhibit.

[Exhibit 4. Original statement of April, '10, in Mr. Swain's handwriting.]

Q. 67. Was Mr. Collver in Boston on April 12, 1910?

A. No.

Q. 68. Where was he?

A. He was on the Atlantic, crossing the ocean to Europe.

Q. 69. When did he leave Boston?

A. I think April 2d.

Q. 70. When did he return to Boston?

A. I think the exact date was September 22d.

Q. 71. During Mr. Collver's absence who had charge of the affairs of The Collver Tours Company in Boston?

A. I did.

Q. 72. Did any person except yourself have any negotiations with the Boylston Bank in behalf of The Collver Tours Company during Mr. Collver's absence?

A. No.

Q. 73. Prior to Mr. Collver's leaving had you gone to the Boylston Bank with Mr. Collver?

A. Yes; I think I went a day or two before he left.

Q. 74. Whom did you see there?

A. Mr. H. B. Bailey, and as I remember I was introduced to Mr. Cumner that first day.

Q. 75. What was said in this conversation? I direct your attention particularly to what was said as to your authority.

A. It was merely for the purpose of introduction, as I was to be left in charge of affairs.

Q. 76. Was that stated in the interview?

A. I think it was.

Q. 77. Are the words written in pencil at the bottom of this Exhibit 4, Collver 1910," in your handwriting?

A. No.

64 Q. 78. Do you know in whose handwriting they are?

A. No, I do not.

Q. 79. Had you personally seen any of the officers of the bank in regard to the renewal of loans in the latter part of 1909 and the early part of 1910?

A. No; that was attended to by Mr. Collver.

Q. 80. What were the circumstances, if you know, which led to the loans not being paid the latter part of 1909?

A. It was principally because of our inability to pay them.

Q. 81. Do you recall at this time any expenditures in the latter part of 1909 and early part of 1910 that accounted for the use of money at that time?

A. There was considerable expense incurred on account of the prospectus for the European business for the summer of 1910.

Q. 82. Was that stated by you to any officer of the Boylston Bank?

A. I don't understand.

Q. 83. Was that fact communicated by you to any officer of the Boylston Bank?

A. No, I don't think it was; principally because I had no dealings with them until April.

Q. 84. At this talk which you testified yesterday about taking place in April, 1910, with the officers of the bank, was anything said as to when the moneys would come in from the European tourists?

A. Yes; I think I showed them a pencil statement showing the dates on which some of the amounts would be received.

Q. 85. Was anything said as to whether the amounts would be received after or before July 1st, 1910, if you recall?

A. Some of them were to be received in May and others in June.

Q. 86. Did you state the expected profits from this European business?

A. Yes, I think I did.

Q. 87. What, if anything, was said as to the sources from which The Collver Tours Company would obtain funds to make payments of the loans outstanding on April 13, 1910, including the $5000 new loan obtained on that date?

A. I think that the understanding was that all the loans, including the $5000, were to be paid out of the European profits.

That was not a guarantee but merely a promise that we would make an effort to pay them out of these profits.

65 Q. 88. I am not certain whether you stated yesterday whether anything was said as to the date as of which you expected to have these loans cleaned up; I mean whether anything was said in this talk of April 13th, 1910, as to when you expected to have the loans paid; if anything was said, state what was said.

A. I think it was promised that they would be paid during July with the exception of $10,000, which it was our expectation to pay during August. I couldn't tell the definite date.

Q. 89. Do you now recall whether anything was said as to the funds out of which it was expected to pay the loan of $10,000 to be paid in August?

A. I don't think any definite funds were mentioned.

Q. 90. Now, to go to a somewhat different subject, did you prepare the schedules in bankruptcy which were filed by the bankrupt in this case, showing assets and liabilities of the bankrupt?

A. I did prepare a schedule.

Q. 91. I hand you one of the original schedules which is endorsed as having been filed in the clerk's office on January 11, 1911, and ask you to examine that, and state whether or not you prepared that schedule of liabilities and assets?

A. I couldn't say definitely without comparing the amounts whether they are the same as those I prepared.

Q. 92. Whose handwriting is this schedule in, do you know?

A. I do not recognize this.

Mr. BAILEY: I won't object to the schedules.

The COURT: The schedules are in as part of the record. They may be offered.

Mr. STUDLEY: If notice may be taken of them, they need not be marked.

The COURT: They are part of the record; need not be marked. I understand the witness said he assisted in the preparation of the schedules?

A. Yes.

Mr. STUDLEY: I should like to inquire whether the same rule would be applied as to the receiver's inventory?

The COURT: I think so. This is a controversy arising in

66 a bankruptcy proceeding, and all the papers in that proceeding may be used as a part of the record; of course, always subject to explanation.

Mr. BAILEY: I had a case where they were ruled out, and even the Supreme Court had to struggle with it. It is not competent evidence, but the witness may refresh his recollection from it; but I know they do hold it is prima facie evidence.

The COURT: Prima facie evidence for what it is worth.

Q. 93. Do you recall what payments were made by The Collver Tours Company to the bank after this loan of April 13th?

A. I couldn't give that information without seeing the books.

Mr. BAILEY: In regard to that, I appreciate very much your

Honor's suggestion about trying to shorten the case, and I am willing this list, Exhibit 2, may be used.

Q. 94. It appears by this Exhibit 2 that a payment of $5000 was made May 12, one of $5000 on May 13 and one of $10,000 on June 20th?

A. Yes; that is correct, I think.

Q. 95. So that by July 1st the amount outstanding was reduced to $10,000?

A. Yes.

Q. 96. Now, I call to your attention that on July 7th there was a new loan made of $5000. Do you recall the occasion of making that new loan?

A. Yes.

Q. 97. What was the occasion of that loan?

A. I merely went to the bank and asked for it, and I think it was given without question.

Q. 98. Whom did you see at the bank?

A. I think I saw only Mr. Bailey, H. B. Bailey.

Q. 99. Do you recall what was said to him as to the object of the loan, if anything?

A. No; I don't remember stating any object except that we needed additional funds and felt that we would be able to repay them in a very short time.

Q. 100. Do you recall to what extent the moneys from your European business coming to you from tours had been received on July 7, 1910?

A. Up to that date?

Q. 101. Yes.

A. I couldn't state exact amount, but a good many thousand dollars had been received and paid out.

67 Q. 102. Do you recall whether any of your tours to Europe started after July 1st 1910, that summer?

A. Yes; there were several.

Q. 103. Do you recall whether payments on those had been received prior to July 7th?

A. Some of them had.

Q. 104. Do you recall any which had not?

A. Yes.

Q. 105. Which? I am perfectly willing you should look at the book if you wish to refresh your recollection.

A. I can give you the information from memory, but not the exact figures.

The COURT: Why couldn't he state what was unpaid?

Q. 106. What was unpaid of the European business?

A. There was about $35,000 or $40,000 still to be received.

Q. 107. What per cent was that of the total moneys you received that summer for European business?

A. I should say about 10 per cent.

Q. 108. How did it happen that more money was needed on July 7th for your European business?

A. Evidently because profits were not as large as anticipated.

Q. 109. It then appears by the schedule that on July 14th you borrowed $5000 more from the bank?

A. Yes.

Q. 110. Do you recall the occasion of that?

A. It was very similar to the other loan of July 7th, as I remember.

Q. 111. Did you go to the bank about it?

A. I did.

Q. 112. Whom did you see?

A. Mr. H. B. Bailey I think was the only person that I saw on that occasion. Of course, I presume that he had talked with Mr. Cumner regarding it, because as I remember it was delayed possibly a day before I got an answer whether it would be given us or not.

Q. 113. Do you recall whether on that occasion anything was said by you on the subject of whether payments had been received from the European tourists for the summer business?

A. I don't understand the question.

Q. 114. Whether the fact that the European tourists, or the summer people, had paid in their moneys to you was the subject of discussion between you and Mr. Bailey at that time?

A. I don't remember that it was.

68 Q. 115. Was the purpose of the loan stated to Mr. Bailey?

A. In a general way; yes.

Q. 116. What was said?

A. Merely that we needed more money to carry out our contracts.

Q. 117. What contracts did you refer to?

A. European parties at that time in Europe.

Q. 118. Had these European parties then in Europe paid to The Collver Tours Company the moneys for their trips?

A. Yes.

Q. 119. Was that stated to Mr. Bailey?

A. I don't think such a statement was actually made at that time.

Q. 120. Was anything said by Mr. Bailey that indicated he knew that was the fact?

A. I couldn't say that he actually knew it; I believe that he knew it.

Q. 121. It appears from the schedule (Exhibit 2) that on July 22d you paid a note of $5000 to the bank, thus reducing the liability to the bank to $15,000?

A. Yes.

Q. 122. Schedule (Exhibit 2) then shows that on August 4th you borrowed $10,000 from the bank?

A. Yes.

Q. 123. And then on August 4th two new notes of $5000 each were given, increasing the indebtedness to $25,000?

A. Yes.

Q. 124. I ask you if you recall these two loans of $5000 on August 4th?

A. Yes.

Q. 125. Were they obtained by you?

A. They were.

Q. 126. Did you go to the bank?

A. Yes.

Q. 127. Whom did you see there?

A. I think on that occasion I talked with both Mr. Bailey and Mr. Cumner.

Q. 128. And what was said in the conversation?

A. I don't remember very clearly just what was said on that occasion, but some considerable explanation was required; but in the end they were satisfied.

Q. 129. What was the explanation that you gave?

A. I think it was obtained on the basis of the Knights of Columbus party which was to sail early in August and the prospective round the world business in the fall.

Q. 130. On the profits of the round the world business,
69 what was said about the round the world business?

A. The same thing that was said about the European business in the spring.

Q. 131. Will you kindly state the substance of the conversation as you recall it?

A. In other words, our failure to take up all the notes with the profits of the European business had made it necessary for us to carry them forward, and promise was made that they should be taken up from the profits of the round the world business.

Q. 132. Was anything said at that conversation on August 4th as to whether the European business had been profitable during the summer of 1910?

A. I don't recall that.

Q. 133. Except for that Knights of Columbus party, had all the moneys from the European business for the summer of 1910 been received at that time, August 4th, 1910?

A. They had.

Q. 134. Except from that, then, had all the moneys from the European business been received on that date?

A. Yes, I think practically all, with the exception possibly of a few hundred dollars.

Q. 135. And for what purpose was this sum of $10,000 which was borrowed on August 4th desired?

A. To complete the European contracts still outstanding.

Q. 136. Does that mean to bring the tourists home and carry them around when abroad?

A. Yes.

Q. 137. And these tourists, with the exception of the Knights of Columbus, had already paid for their tours?

A. Yes.

Q. 138. Is it a fact that at that date, August 4th, you knew that the European business had not been profitable?

A. I didn't know it, but I believed—I was beginning to believe that it had not. Of course the books were very far behind, and I had no way of balancing it up, but the fact that we were obliged to borrow again made it evident that they had not shown a profit.

Q. 139. Do you recall whether or not at about that time it became necessary to cable moneys to Europe to take care of the tourists there?

Mr. BAILEY: Do you mean to say they were not doing that all the time?

Mr. STUDLEY: Not to the extent they were during this particular time?

70 A. Yes.

Q. 140. How frequent did cablegrams become at that time for money, do you remember?

A. Sometimes at intervals of two or three days, and on one occasion it was practically every day.

Q. 141. And when did cables begin to come every day?

A. I couldn't give you a definite date.

Q. 142. Could you by reference to any of the books find out?

A. Yes, I think I could.

Q. 143. What particular book?

A. I think the checkbook will do.

Q. 144. From whom did cablegrams come?

A. They came from various directors, but most of the money was sent to Mr. Collver.

Q. 145. Will you tell us when cablegrams began to come every day?

A. (Looking at checkbook.) One was sent August 10th to Mr. Collver, which I should say was about the first one.

Q. 146. You say one was sent. Do you mean moneys remitted by cable?

A. Yes.

Q. 147. Was the remittance made through the bank?

A. Through Brown Brothers & Company.

Q. 148. How was the bank concerned in these remittances by cable, if at all?

A. Merely by honoring our check which was sent to Brown Brothers to cover the amount.

Q. 149. You say there was a cable remittance made to Mr. Collver as of what date?

A. August 10th.

Q. 150. Through how long a period did the remittances to him continue by cable; when was the next one?

A. August 13th.

Q. 151. What was the amount of the August 10th remittance in round figures?

A. $1900.

Q. 152. And of the August 13th?

A. $485.

Q. 153. The next?

A. August 15th, $960. August 18th, $1900. August 22d, $295. August 22d, another amount, $969. August 25th, $2500. September 8th, $100. That is all to Mr. Collver. There were some to the other directors after Mr. Collver had left, and I find some before he left which was sent direct to other men.

71 Q. 154. By "directors" you mean what I call conductors,—leaders of parties?

A. Yes.

Q. 155. During August, 1910, did you go to the bank on any occasions when any of these notes were renewed or new loans made?

A. I think I did the latter part of August in an effort to secure another loan.

Q. 156. How often did you go to the bank?

A. There was a time when I went nearly every day for a few days.

Q. 157. I call to your attention that schedule Exhibit 2 shows that on August 16th two notes for $5000 each became due and were renewed. Do you recall whether at that time you went to the bank with reference to that renewal?

A. I do not recall the exact circumstances, but I presume I must have gone to the bank although I don't remember whether merely as a matter of form or whether I had to make an explanation.

Q. 158. Do you recall why the notes were renewed and not paid?

A. Because more money, more funds, were required.

Q. 159. I hand you two notes dated August 4, 1910. Do you recall whether these were the notes that were discounted by the bank on August 4, 1910?

A. I should say they were.

[Notes offered by Mr. Studley, and marked "Exhibit 5," sixty day note, $5000, made by The Collver Tours Company. "Exhibit 6," thirty day note, $5000, made by The Collver Tours Company.]

Q. 160. You have already testified that Mr. Collver was in Europe on August 4th?

A. Yes.

Q. 161. Were these notes signed in blank and endorsed as stated by Mr. Collver before he went?

A. They were.

Q. 162. He left a batch of these notes signed ready for use if necessary?

A. He left several; yes.

Q. 163. The dates and amounts were filled in by you or somebody in the office?

A. By me.

Q. 164. In whose handwriting is that part of the note which is not in Mr. Collver's and which is not printed?

A. It is my own.

Q. 165. The part that is in Mr. Collver's writing is merely the signature?

A. The signature and the endorsement.

72 Q. 166. Can you find out by examining the books the date when the Knights of Columbus party paid?

A. Yes.

Q. 167. I wish you would find out that date.

A. I think the cash book, or ledger, will do (looks at ledger). There was a payment made on July 18th of $23,765.

Q. 168. Was that a payment in full for that tour?

A. No.

Q. 169. When was the rest paid?

A. Another payment was made July 20 of $5952. Another payment August 6th of $2032. That was all the principal amount—might have been a few small items.

Q. 170. Did any payments of consequence come in from the European business after August 6th?

A. No large amount.

Q. 171. From what sources did the funds that were received by The Collver Tours Company after August 6th come?

A. Principally from round the world business.

Q. 172. When were the round the world tours for which these payments were made to begin?

A. The first one was in September; thereafter in October and November.

Q. 173. How long were these tours to take?

A. About six months.

Q. 174. Did these tourists on the round the world tours pay in advance for the whole tour?

A. They did.

Q. 175. Was that fact stated to the bank?

A. I couldn't say that I told them in as many words, but my impression was that it was understood. It was stated in our printed matter and catalogues.

Q. 176. Had that been the method of doing business ever since The Collver Tours Company had been in business?

A. Ever since I had been with them.

Q. 177. Do you recall any cablegrams received from Mr. Collver in August, 1910, beyond what you have testified to about which you spoke to the officers of the bank?

A. Yes, there were several.

Q. 178. Now, what conversation did you have with the officers of the bank about them, and which officer of the bank did you see?

73 A. I think my conversation in regard to any cables was confined entirely to Mr. Bailey—I don't remember seeing Mr. Cumner in regard to any cablegrams.

Q. 179. What talk did you have with Mr. Bailey about cablegrams?

A. I can't remember—there were so many that I don't recall any conversation; that is, the text of any conversation.

Q. 180. Do you recall the substance of it without being able to attribute any particular conversation to any exact date? Can you recall the substance of the talks you had with him in August about cablegrams?

A. The substance was that more money was required for the European contracts and that we needed—or at least that my wish was to secure more funds by discounting notes.

Q. 181. You may look at the list of notes, Exhibit 2. Did you at any time after August 4, 1910, and during the month of August,

1910, apply to Mr. Bailey for an additional loan, outside of the renewals,—any additional loan after August 4th?

A. Yes, I think it was the latter part of August—might have been early in September, but I think in August.

Q. 182. Now, what took place at that interview? What was the occasion of your interview with him?

A. To request the discounting of another note.

Q. 183. And what took place at that interview?

A. I told him that I had received an urgent cablegram from Mr. Collyer and that something must be done, but he asked me if I didn't think we could get along for a few days and told me in other words—to use the exact words as I remember them, he counselled me "to keep a stiff upper lip" and to wait a day or two if possible, and that is what I did. Afterwards it became unnecessary—afterwards we found that we didn't require the notes and continued until September 6th before taking another note.

Q. 184. September 6th was a renewal or a new loan?

A. That was a renewal.

Q. 185. A note fell due upon that date?

A. Yes.

Q. 186. Were you able to pay it?

A. I think at that time we might have paid it, but I requested them to renew it, which they did.

The COURT: How much?

74 Mr. STUDLEY: $5000.

Q. 187. September 6th—have you your checkbook before you to cover that date?

A. Yes.

Q. 188. Was the amount of that new note discounted on that date, that is, the note which was renewed, placed to your credit at the bank?

A. Yes.

Q. 189. Now, according to your deposit book—did you keep a deposit book in addition to checkbook?

A. We kept a bankbook on which a record of the deposit was made.

Q. 190. Did you on the stub of your checkbook keep a record of your deposits also?

A. Yes.

Q. 191. Now, according to your checkbook stub which you have before you, how much money did you have in the bank on September 8th?

A. At the beginning of the day's business?

Q. 192. Yes. If different, state beginning and close also.

A. The amount in round figures was about $1350.

Q. 193. At the beginning that day?

A. At the beginning.

Q. 194. At the close of the day how much was it?

A. At the close of the day the amount was about $7850.

Q. 195. At one time during the day did it go below those figures?

A. That is hard to tell, because it is difficult to remember just what time of day these checks were drawn and just what time each deposit made.

Q. 136. Your books show at one time there was but $23 on that day?

A. That is an amount carried forward; yes. These checks, however, might have been drawn, but might have been used later in the day.

Q. 197. From what source did the funds come which were deposited on that day, September 8th?

A. They were received on account of round the world parties.

Q. 198. Was that fact known to the officers of the bank?

Mr. BAILEY: I think that you ought to ask for what was said.

Q. 199. Did you have any conversation with any officer of the bank, and, if so, what officer and when did you have the conversation, relating to the sources from which the moneys which were being deposited by The Collver Tours Company at that time
75 were received?

A. I don't remember whether anything was actually said about the source from which they were received.

Q. 200. Was anything said as to the amount of business you were then conducting, of the kind of tours you were then conducting?

A. Why I think it had been understood in all our conversations, or at least I don't think I ever considered it necessary to say that because we had done business with them so long I presumed it was understood.

Mr. BAILEY: Your Honor will notice that we are getting in a good deal that I might object to. I want to have the credit of not objecting.

The COURT: I will take judicial notice of your liberality.

Q. 201. Without going into the deposits that were made after September 8th through to October 11th, deposit by deposit, I should like to ask the general question from what source those deposits were derived?

A. Principally from round the world business.

Q. 202. It appears from Exhibit 2 that on September 12th the loans, which were $25,000, were reduced by $5000 by the payment of a note. Did you have any talk with any officer of the bank, and, if so, with which officer, on the occasion when that note was paid?

A. No; not until after it was paid.

Q. 203. How was it paid?

A. Simply charged out of our account.

Q. 204. That is, you did not give any check for it?

A. I find a record on the check stub of a check dated September 12th to the Boylston National Bank for $5000.

Q. 205. Do you wish to correct your statement that you didn't know anything about it until after it was paid?

A. Perhaps it was the note paid September 21st that was charged out.

Q. 206. You do find a record on the check stub?

A. Yes.

The COURT: Instead of charged to your account that should be paid by you?

A. Yes.

Q. 207. That September 12th note was paid by check?

A. Yes.

Q. 208. With the fact that it was paid by check before you, do you recall any conversation with any officer of the bank about the payment of September 12th?

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A. I think on that occasion I told them that we would pay it if there was some understanding that we could secure additional funds later, and, of course, they wouldn't give a definite promise to that effect, but my understanding was that——

Mr. BAILEY: I don't quite think—unless we have the substance of something said——

The COURT: Counsel objects to your assumptions or statements of understanding, or impression. All of them are rather objectionable as evidence. What we want is, as far as you can give it, what was stated in any conversation.

A. The conversation was confined principally to a statement by myself that I was merely paying the note in order to show them that our desire was to clear up the loans as quickly as possible, but that we would not pay it unless I felt there was some understanding that other additional notes would be discounted later when we required them, and with that understanding I paid the note, although, as I remember, that check which is recorded here was drawn after I had been to the bank and they had told me that the amount was charged to our account; in order to keep the record straight I drew a check.

Q. 209. They accepted the check?

A. Yes.

Q. 210. By the way, what officer of the bank did you talk with?

A. Mr. H. B. Bailey.

Q. 211. I am not sure it has appeared what office he held in the bank; do you know what office he held in the bank?

A. I presume he was assistant cashier.

Q. 212. Did he have charge of this particular matter; so far as you were concerned in the dealings between the bank and the corporation did he have charge of them?

A. Most of our dealings were with him. He was present at every conversation I had.

The COURT: What do you mean by "this matter"?

Mr. STUDLEY: I mean the discounting of loans and renewals.

Mr. BAILEY: I understood him to say earlier that Mr. Cumner is the man he talked with, and more frequently with Mr. Bailey.

77 Mr. STUDLEY: I don't think Mr. Bailey's authority is disputed.

Mr. BAILEY: No, I don't think so.

Q. 213. On this occasion, September 12, 1910, when you had this talk, was anything said as to the purposes for which The Collver Tours Company would later require moneys?

A. I don't think it was stated definitely; no.

Q. 214. Was the fact that moneys had been received from round the world tourists, and that contracts with these tourists would have to be carried out, alluded to?

A. I think the conversation tended merely to show that the money which might be required later would be for the purpose of completing the round the world contracts.

Q. 215. Do you recall the payment on September 21st of $5000?

A. Yes.

Q. 216. Can you turn to the checkbook and find out how that was paid?

A. That was paid by check.

Q. 217. What was the date of the check?

A. It is dated September 20th, but it has been changed apparently to September 21.

Q. 218. And the amount is $5000?

A. $5000.

Q. 219. Did you have any conversation with any officer of the bank with reference to that payment?

A. With Mr. Bailey, I think.

Q. 220. What was that conversation?

A. About the fact that this payment was being made also with the same understanding—that we were to be favored later with renewals if required; at least that was my understanding.

Q. 221. Do you recall the payment of September 30th, $5000?

A. Yes.

Q. 222. How was that paid?

A. That was paid by check.

Q. 223. And the date of the check and the amount?

A. September 30th, $5000.

Q. 224. I have assumed that these checks were each payable to the Boylston National Bank; is that correct?

A. They were.

Q. 225. Did you have any talk with any of the officers of the bank about that time?

A. I don't remember about the payment of that; I don't think anything important was said.

78 Q. 226. Now, coming to October 3d, was there a payment made on that date?

A. Yes; there was a payment of $2500 made.

Q. 227. And how was that made?

A. That was made by check to reduce a note due on that day, and a new note for $2500 was given for the balance.

Q. 228. Was a check drawn by you, do you remember?

A. I find a note on the stub of the checkbook: "No check given; note charged into account."

Q. 229. With that note before you are you sure that a check was given? Do you wish to change your testimony that check was given?

The COURT: Possibly check might have been destroyed, or not delivered.

Mr. BAILEY: No check given, that is, at the bank.

The COURT: From the fact that the stub makes mention of that situation undoubtedly check wasn't used, although it may have been made out.

Q. 230. Did you have any talk with any officer of the bank on October 3d with reference to that payment by way of having note charged against the account?

A. I think I protested against their doing it in that way as we were making an effort to reduce the account as quickly as poossible ourselves.

Q. 231. October 14th there was a further payment of $5000 shown on Exhibit 2. Do you recall how that was made?

A. No, I don't recall.

Q. 232. Do you find any check for that amount?

A. I find no check drawn on that date.

Q. 233. Would your cashbook show whether the money was paid on that day or not?

A. It should show it; yes. [Refers to cashbook.] There is no entry on the cashbook for that amount dated October 14.

Q. 234. Look along and see if you can find it.

A. I find an entry dated October 21 for $5000.

Q. 235. Does that indicate in what way the amount was paid?

A. It would indicate to me that the note had been charged into our account, and we didn't discover that fact until the 21st.

79 Q. 236. Does entry on the check stub under date of October 21 refresh your recollection upon the matter?

A. Nothing further than I have just stated. That is the original entry from which the cashbook entry was made.

Q. 237. What is the entry on the check stub? Just read it.

A. "Note due October 14 was paid, $5000," but no check drawn on that date.

The COURT: That note is opposite what check, so as to get the date?

A. Opposite check No. 5277, October 22.

Q. 238. Was there any check drawn, so far as the checkbook shows, for that payment of $5000 on October 14th?

A. No record is made on the checkbook.

Q. 239. Now, between April 13, 1910, and September 12, 1910, was there any increase in the value of the good-will of The Collver Tours Company, so far as you know?

A. I should say it having increased its business to a considerable extent that there was additional value.

Q. 240. Was there any increase in the value of the foreign office account between these dates?

A. Very slight one, perhaps.

Q. 241. Was there any increase in the value of the office fixtures

A. Possibly a very slight one.

Q. 242. Prior to the payment of the note of $5000 falling du on September 12, 1910, was there a decrease in the liabilities o The Collver Tours Company between April 13, 1910, and Septem ber 12, 1910?

A. I couldn't answer that question because the books were allowe to get very much behind, and it was, in fact, some time in November or shortly before the bankruptcy proceedings, before they wer finally cleared up, and I have never seen the books to know jus what the condition of the business was on that particular date.

Q. 243. Mean you never have seen them?

A. I have seen them, but I have never investigated clearly t see what the condition of the business was on that particular date nor could I state just what it was in September.

Q. 244. Can you answer whether the liabilities were in
80 creasing or decreasing after April, 1910?

A. The liabilities were increasing, but so were the assets

Q. 245. In September, 1910, were the assets more or less tha they had been in the preceding April?

A. More than they had been April 13th do you mean, or an time during the summer?

Q. 246. April 13.

A. I would have to refer to the books to find out just what the were April 13. The amounts were so large that a day could mak quite a difference.

The COURT: Could you ask him what was the comparative rela tion of assets and liabilities in April, 1910, as compared with Sep tember, 1910?

Q. 247. I would like to ask you that?

A. As I have said before, I do not know what they were in Sep tember.

Q. 248. Was there any change between September and October

A. The only change was the fact that the books had been balance possibly sometime in October. At that time I could have told you

Q. 249. Did that make any difference in the assets and liabil ties?

A. No; but it made a difference in my ability to know wha those amounts were.

Q. 250. Apart from the details, was the corporation getting int debt or getting out of it?

A. We didn't know at that time.

Q. 251. Do you know now?

A. No, I don't know just what it was at that time—what th condition was at that time even now.

The COURT: What time?

A. In September. In other words, the books got behind a through the summer, they were several months behind, and unt they were closed and a statement taken off I couldn't know myse what the condition of the business was.

Q. 252. Did you discover at some time that the corporation was unable to pay its liabilities?

A. Well, there were times——

Q. 253. Won't you answer that question: Did you discover some time in 1910 that the corporation was unable to pay its liabilities?

A. That wasn't discovered until the bank proceedings.

Q. 254. You mean the assignment?

A. The assignment.

Q. 255. Was there any change in the condition of the corporation between the time when the assignment was made and
81 September, 1910? Any difference in the situation of the corporation on December 2, 1910, and its situation September 1, 1910?

A. The only difference was the amounts which had been paid to the bank presumably, with the addition of such amounts as had been paid for round the world parties.

Q. 256. Are you able to state whether the situation of the corporation was any worse or better at the date of the assignment, which was December 2, 1910, than it was on September 1, 1910?

A. No, it wasn't any better, I should say.

Q. 257. Was it any worse?

A. Apparently it was worse.

Q. 258. Was it any worse except for payments made to the bank—this sum of $22,500 that had been paid to the bank?

A. It is impossible to tell, because we never could tell how much profit was made on the round the world parties, for the contracts were never completed.

Q. 259. The round the world parties never completed by The Collver Tours Company?

A. No.

Q. 260. I think you said that you stated to Mr. Bailey on one or more occasions in September, 1910, that the corporation The Collver Tours Company would have to have more money to carry out its contracts with round the world tourists?

A. Yes, I think I stated that.

Q. 261. Was that fact known to you at that time?

A. You mean that more money would be required?

Q. 262. Yes.

A. Yes.

Cross-examination.

(By Mr. BAILEY:)

X Q. 263. Mr. Swain, did you assist in preparing this prospectus, or whatever you may call it, prepared in June, 1909—or dated June 8, 1909, describing The Collver Tours Company and its business and condition?

A. No; that was printed before I returned from Japan, or at least very soon after.

X Q. 264. Did you see it at the time it was issued?

A. I saw it shortly after it was issued.

X Q. 265. That was prepared by whom, under whose direction?

A. I presume under Mr. Collver's.

82 X Q. 266. But you say you think it had been put shape to be printed while you were away?

A. Yes.

X Q. 267. How much were you away that spring?

A. I was away from the latter part of February until early June, 1909.

X Q. 268. And when you got back and this was printed you d see it, did you?

A. Yes.

X Q. 269. And did you know that the bank had a copy of it give to it?

A. No, I did not.

Mr. BAILEY: I offer this.

Mr. STUDLEY: I will ask that it be admitted de bene. I haven seen this.

[Exhibit 7. Prospectus of Collver Tours Company, dated Jun 8, 1909. Admitted de bene.]

Mr. BAILEY: We will show that the bank did receive it about th time.

[Exhibit 7 read by Mr. Bailey.]

X Q. 270. Now, Mr. Swain, I show you a letter dated October 1 1909, addressed to the Boylston National Bank, and ask if you ca tell us whose handwriting that is?

A. That is Mr. Collver's handwriting.

[Exhibit 8. Letter dated October 7, 1909, from Leon Collver Boylston National Bank.

Exhibit 8 read by Mr. Bailey, who called particular attention the following words:—

"I will take this occasion to notify you that the company, an myself personally, have now no outstanding obligations other tha our discounts with you—the Boylston National Bank—also that ou business is now coming on splendidly."]

X Q. 271. You were with Mr. Collver at that time?

A. Yes.

X Q. 272. And were in the Boston office?

A. Yes.

X Q. 273. And after you got back from that trip to Japan i May, 1909, you continued at the Boston office, did you?

A. Yes.

X Q. 274. Now, some time in 1909 there came a matter, did the not, what is called "the letter of credit business," a special accoun in connection with the letter of credit business; that is right?

A. I don't know the letter you refer to.

83 X Q. 275. Let me show you this letter dated July 22, 190 written by Mr. Collver, and see if that refreshes your memor at all about the letter of credit business, and when and what figu that had in your business.

A. That was merely an arrangement made with the bank on the request that we place our letter of credit business with them, rather through them.

X Q. 276. Will you explain to us a little bit what that letter of credit business was, just what part that had to do and what the bank had to do with it?

A. It was an arrangement by which they delivered letters of credit to us, that is, letters of credit issued by Brown Brothers against which the drafts were charged from our account as they came in from Brown Brothers, who in return had received them from the various banks abroad where they were cashed.

X Q. 277. Now, let me see if I can make it a little plainer; the letters of credit were issued to be paid by Brown Brothers on their correspondents?

A. Yes.

X Q. 278. They were issued either to The Collver Tours Company conductors or to your customers—we will call them customers—your tourists we will call customers?

A. Yes.

X Q. 279. And the Boylston National Bank was the medium, the agent of Brown Brothers, to issue these letters of credit; is that right?

A. Yes.

X Q. 280. And they guaranteed to Brown Brothers, did they not, the repayment to them of the amount called for?

A. I presume they were obliged to guarantee them.

X Q. 281. And they requested, did they not, that there be a special account, which existed at different times, called "The Collver Tours Company Letter of Credit Account"; you knew about that?

A. Yes.

X Q. 282. That was carried on your books as well as on the books of the bank?

A. Yes.

X Q. 283. The Boylston Bank was the only bank, was it, at which you had a deposit account?

A. Yes.

X Q. 284. And that was the only bank that was discounting your paper?

A. Yes.

84 Q. 285. And that meant that as your money came in in regular course from different sources, mostly from tours, it was deposited in that bank?

A. Yes.

X Q. 286. And that continued from first to last down to the time business stopped in December?

A. Yes.

Mr. BAILEY: That last letter I don't care to put in.

The COURT: The letter of credit business you get on the record through the testimony?

Mr. BAILEY: Yes, and I will put in presently a transcript of the letter of credit account.

[No cross-question numbered 287.]

X Q. 288. Now, beside the general deposit account which you had with the bank and which was carried in your checkbook, you

had, did you, a special deposit account called "The Collver Tours Company Letter of Credit Account"?

A. Yes.

X Q. 289. Will your memory serve you, refreshing it by this slip, which is a transcript of the books of the bank, to see if these are the dates covered by that (handing witness transcript)?

A. What do you mean?

X Q. 290. According to your memory, were those the periods during which there was, beside the general deposit account, the special letter of credit account?

A. It began in May, 1909; that was while I was away.

X Q. 291. You got back very soon after?

A. Very soon after.

X Q. 292. Apparently a little interregnum here. First account is 12th of May to June 1st, and then there seems to be a separate account in July, and then they seem to begin again in November?

A. That is merely occasioned by the fact that there were times when we used no letters of credit.

X Q. 293. Nothing doing?

A. Yes.

Mr. BAILEY: I am going to offer this later.

X Q. 294. Now, coming to the fall of 1909, there was a special arrangement, was there not, about the letters of credit and an agreement about them? I will show you this agreement, dated December 11, 1909, about that special deposit account.

A. Yes; I remember seeing this before.

85 Mr. STUDLEY: I suppose Mr. Bailey makes this his own witness?

The COURT: That is a Federal rule. The relation of the parties was pretty thoroughly gone into.

Mr. STUDLEY: This doesn't appear to be an agreement at all—a memorandum signed by The Collver Tours Company. Doesn't appear that the Boylston Bank ever became a party to it.

Mr. BAILEY: I will put in the letters that go with it, and I understand this witness to say he remembers seeing such an agreement.

Mr. STUDLEY: I suppose he remembered seeing a paper about it.

X Q. 295. Perhaps this letter of November 24th will make it a little clearer. This was a letter from Mr. Collver, was it, to the bank?

A. Yes.

[Exhibit 9. Letter from Leon Collver to Boylston National Bank dated November 24, 1909.

[Exhibit 9 read by Mr. Bailey.]

X Q. 296. Now, showing you again the paper dated December 11, 1909, that you say is in whose handwriting?

A. Mr. Collver's I should say.

Mr. STUDLEY: It doesn't appear at present this is an agreement of any kind. It is a memorandum.

The COURT: I will take it de bene.

[Exhibit 10, Agreement dated December 11, 1909, signed "The Collver Tours Company, Leon Collver, Prest.". Admitted de bene. Exhibit 10 read by Mr. Bailey.]

X Q. 297. Now, as a matter of fact, the letter of credit account, that did ultimately take care of the letters of credit, as I understand, and there was nothing due or to become due—nothing finally due the bank by reason of the letters of credit and its guarantee upon which they were taken care of by the special account; is that right?

A. Yes, I think so.

X Q. 298. Did the letter of credit business, as a matter of fact, some time in 1910, go elsewhere; that is, you placed that business through somebody else rather than the Boylston National Bank?

A. Some of it was done through other concerns.

X Q. 299. That was in 1910, was it?

A. That was in 1910.

X Q. 300. So that the amount of business of that sort that
86 was done by them got less in 1910, in the summer some time. Could you say the amount of that business they did grow less in volume, or did it increase so that you thought best to divide it?

A. It increased, and for that reason we thought it best to divide it, principally for our own benefit, as we received a commission on the business if we handled it direct.

X Q. 301. The placing of that business somewhere else was done by The Collver Tours Company for their convenience, or benefit, and not by any suggestion of the Boylston National Bank?

A. No; not that I recall.

X Q. 302. They didn't request that you go elsewhere with that?

A. No; I don't think so.

X Q. 303. And as a matter of fact they got a small commission on that business and never suggested that they didn't wish to continue?

A. No; they never suggested it.

X Q. 304. Now the letter Exhibit 9, which says, "I am enclosing a check for $15,000, with which to open a second account"—look at this slip which I show you—that shows, does it, in November, 1909, a deposit of $15,000; you understand in this bank they don't put down the ciphers, only the 15; that is $15,000 (showing witness slip)?

A. Yes.

X Q. 305. Now, can you by looking at your checkbook of that date see if that came out of your general account, November 24, 1909?

A. There is an entry in the cashbook dated November 24, 1909, showing that $15,000 was paid to the Boylston National Bank for a deposit account called "The Collver Tours Company Letter of Credit Account".

X Q. 306. And if the transcript of the bank account shows on that day a check drawn of $15,000 from your general deposit account that would agree with your book entry?

A. Yes; that was posted from the checkbook stub.

X Q. 307. Now, it was in the fall of 1909 that the notes held by the bank were renewed and not all paid as they had been the previous year; that was the time this $15,000 account was started, wasn't it; that is about the time, November and December, 1909, that the matter was up why the notes the bank had discounted were
87 not taken care of out of the 1909 business?

A. I am not very familiar with that because I had very few conversations regarding notes at that time.

[Adjourned at 1 p. m. to January 22, 10.30 a. m.]

BOSTON, MASS., *January* 22, 1912.

X Q. 308. Now, Mr. Swain, who during the year 1910 had power to sign checks on the Bolyston National Bank?

A. Both Mr. Collver and myself.

X Q. 309. And that was true as to the general deposit account and the letter of credit account, was it?

A. There were no checks drawn against the letter of credit account.

X Q. 310. I am glad you mentioned that. Tell us about that.

A. That was deposited to cover letters of credit, and drafts were drawn by the holders of letters of credit.

X Q. 311. So that charges against that were from time to time. When the Boylston National Bank was informed of drafts against a letter of credit then they charged those to the account?

A. That is it.

X Q. 312. Now, I will show you here a letter dated December 16, 1909, and ask you whose signature that is?

A. That is my own.

X Q. 313. And the specimen of signature attached, that is yours?

A. That is also mine.

Mr. BAILEY: I offer this to show when he began to sign checks.

[Exhibit 11. Letter of December 16, 1909, to Boylston National Bank from The Collver Tours Company.

Exhibit 11*a*. Slop attached to Exhibit 11.]

X Q. 314. Now, I show you a letter dated December 18, 1909; that was signed by you, was it?

A. Yes.

[Exhibit 12. Letter from The Collver Tours Company to Boylston National Bank dated December 18, 1909.]

X Q. 315. Now, as a matter of fact from that time on were the checks countersigned; did you live up to that?

A. Oh, yes; in every case.

X Q. 316. And during the period from December, 1909,
88 down to the first of April 1910, while Mr. Collver was in the country who signed the checks, you or he?

A. I think most of them were signed by himself.

X Q. 317. And after he went away the 2d of April, and until he got back the 22d of September, 1910, who signed them?

A. I signed them.

X Q. 318. And after he got back and until December, who signed them, you or he?

A. I think most of them were still signed by myself.

X Q. 319. Now, calling to your attention checkbook under date of May 2, 1910, what was the amount of the deposit in the general account on May 2d, according to the stub of the checkbook?

A. You mean the deposit on that date?

X Q. 320. What was your balance either beginning or end of the day, the bank balance as you had it?

The COURT: The balance shown on the stub.

A. In round figures, $27,000.

Mr. STUDLEY: Beginning or end of day?

A. That was the end of the day.

X Q. 321. On May 3d how was it at the end of the day?

A. Do you wish exact figures?

X Q. 322. No; thousands?

A. $35,000.

X Q. 323. And the next day, May 4?

A. There happened to be no deposit on that day.

The COURT: May 4th the same?

A. No checks drawn.

X Q. 324. What was the balance at the end of May 4th?

A. $34,800.

X Q. 325. May 5th?

A. $33,400.

X Q. 326. For the sake of brevity skip down to May 12, when it appears by Exhibit 2 there was a note of $5000 paid; what was the balance on May 12 at the end of the day?

A. $24,700.

X Q. 327. And on the next day, what was the balance the 13th?

A. About $28,000.

X Q. 328. May 13th there was another note of $5000 paid as appears by Exhibit 2. Now, coming down to May 21 what
89 was the balance at the end of that day?

A. I find no record of a note paid on May 13th.

X Q. 329. Don't you find a note, one paid on May 12th by check and another one on May 13th, a note paid by check?

A. No; there is no check stub.

X Q. 330. Will it help you any to look at the list Exhibit 2. Don't you find a check there for $5000 one day, and the next day $5000?

A. No; there is no check stub.

Mr. BAILEY: There is no dispute that they paid, and our account shows that they paid by check, so we will get at that later.

Mr. STUDLEY: It appears on the cashbook under date May 13, $5000, and so appears in the ledger, $5000 paid.

X Q. 331. Now, come a little later in the month to May 23d; what was the balance May 23d as you have it at the end of the day?

A. $36,000.

X Q. 332. And the next day, the 24th?
A. $32,400.
X Q. 333. The next day, the 25th?
A. $29,000.
X Q. 334. The next day, the 26th?
A. $28,700.
X Q. 335. The 27th?
A. $27,400.
X Q. 336. Now, in the month of May, 1910, you thought the prospects of a successful season were good, did you not?
A. Yes.
X Q. 337. And something was done about declaring a dividend of three per cent on the stock of the company, wasn't there?
A. I don't remember that. I can tell by referring to the record.
X Q. 338. If you could?
A. That is, I don't remember. If it was done it was done before Mr. Collver went away; that is, early in the year.
X Q. 339. You mean previous to May? Was it directed or arranged for then, or when was it? See what was done about it. When was that and what was it? (Witness refers to company's records.)
A. February 1, 1910.
X Q. 340. How much of a dividend was then voted?
A. Three per cent.
Mr. STUDLEY: Payable when?
A. Declared payable May 2d.
Mr. STUDLEY: On what stock? On all stock, or preferred, or common?
90 A. It doesn't state, but it was on the preferred stock.
The COURT: It was on the preferred, and not on the common?
A. I don't think any stockholders were common stockholders that received that dividend.
X Q. 341. Now, coming down to June, 1910, on June 20th it appears by Exhibit 2 that there was a payment of $10,000 on notes. I want to ask you what the balance of the general deposit account was a little earlier in June; commencing with June 8, what was it?
A. About $54,500.
X Q. 342. On June 9th?
A. $47,000.
X Q. 343. June 10th?
A. $45,000.
X Q. 344. June 11th?
A. $53,500.
X Q. 345. June 13th?
A. $55,700.
X Q. 346. June 14th?
A. $59,500.
X Q. 347. June 15th?
A. $53,000.
X Q. 348. June 16th?

A. $41,000.

X Q. 349. June 17th?

A. There was no change on the 17th.

X Q. 350. June 18th?

A. $41,000.

X Q. 351. June 20th?

A. $25,000.

X Q. 352. Does your book show the payment of two notes aggregating $10,000 on the 20th?

A. Yes, there is a check for $10,000 on that day.

X Q. 353. And the balance was after paying those notes?

A. Yes.

X Q. 354. And it was $25,000?

A. $25,000.

X Q. 355. Now coming down a little later into October, October 13th?

Mr. BAILEY: Exhibit 2 shows a note for $5000 paid on October 14 by charging it into the account; perhaps your Honor will recall that as being the last note that was paid.

X Q. 356. Now, on the 13th of October what was the balance?

A. $23,700.

X Q. 357. What was the balance at the end of the 14th?

A. $23,600.

X Q. 358. Your book didn't then show the payment of the $5000 note?

A. No.

91 X Q. 359. That you didn't get on your book until later?

A. No.

X Q. 360. October 15th what was the balance?

A. $24,100.

X Q. 361. October 17th?

A. $23,700.

X Q. 362. October 18th?

A. $23,500.

X Q. 363. October 19th?

A. No change.

X Q. 364. October 20th?

A. $20,450.

X Q. 365. October 21st?

A. The balance shows $19,500.

X Q. 366. Was that before or after the $5000 was taken out?

A. Before the $5000 taken out, and that is merely in the form of a memorandum stating that note due October 14th was paid and it doesn't show what date that was entered into the books.

X Q. 367. Then you tell when you subtract that from the bank balance. Did you subtract?

A. Yes.

X Q. 368. On the 21st?

A. It doesn't show on the checkbook what date, whether the 21st or 22d.

X Q. 369. One or the other?

A. It was made on the same page with entries under both dates.

X Q. 370. Then at the close of the 22d what was the balance then?

A. $14,400.

X Q. 371. And the 24th balance?

A. $13,700.

X Q. 372. The 25th?

A. $13,500.

X Q. 373. Now, Mr. Swain, after Mr. Collver got back in September, 1910, between that and December you had some talk with him about having a larger interest in the business?

A. Yes, I did.

X Q. 374. Remember what month that was in, October or November?

A. I think it was October. You say some "larger interest." I had no interest at that time.

X Q. 375. Didn't you beside your salary have a percentage or commission on some of the business?

A. Yes, I had a commission.

X Q. 376. Precisely. And you proposed to him in October, if it was October, that you should have an interest in the company by becoming a stockholder; something of that sort?

A. Yes.

X Q. 377. And you in November were fitting up an office, or re-fitting one of the offices for your use?

A. Yes; partitioned off a small part of the main office.

92 X Q. 378. That was in November?

A. I think it was in November; yes.

Redirect examination.

(By Mr. STUDLEY:)

Q. 379. Mr. Swaine, there is one matter I omitted on direct examination. At any time in the fall of 1910 did you make application for loans at the Boylston National Bank; I mean on any occasion when you were refused?

A. Yes.

Q. 380. When was that?

A. Some time the latter part of November, or early in December.

Q. 381. It was prior to the failure of the company?

A. Yes.

Q. 382. Whom did you see at the bank on that occasion?

A. I think I talked with both Mr. Cumner and Mr. Bailey.

Q. 383. What was the conversation so far as you recall it?

Mr. BAILEY: I won't say that it might not be competent, but I am wondering whether the last payment or set-off complained of was the 15th of October; that was a month or six weeks latest, and it might not be at all competent in this matter, but, of course, depends on what it is. I think your Honor better take it de bene.

The COURT: Yes.

Q. 384. You may proceed with the conversation?

A. As I remember, the bank was reticent about permitting or renewing our loans, and stated that they would prefer to have us transfer our account to some other bank, and I reported——

Q. 385. Have you stated the whole conversation so far as you recall it?

A. That is the substance as I remember it.

Q. 386. Were any reasons stated why at that time—either by Mr. Bailey or Mr. Cumner—as to why the bank did not wish to renew or make new loans to you?

A. No, I couldn't say that they stated any particular reason other than that they thought they had carried them long enough.

Q. 387. Was that said, that the bank thought they had carried the loans long enough?

A. I think it was.

Q. 388. Had there been any change in the condition of The Collver Tours Company between October 14, 1910, and the date of this conversation you had with the officers of the bank?

Mr. BAILEY: This, of course, must go in as indirect.

93 A. Yes, there had.

Q. 389. What change?

A. The funds, or the bank balance, had considerably decreased, and as it was practically a cash business that very seriously affected the condition.

Q. 390. Why had the bank balance decreased?

A. Principally because of payments for round the world business.

Q. 391. Now, calling your attention to the matter which Mr. Bailey has just inquired of, namely, the bank balance in October, 1910, Mr. Bailey inquired the balance on October 13th to October 25th. What was the source of these deposits?

A. (Looking at checkbook.) These were principally on account of round the world business, but they were very small; the total deposit was very small between those two dates. The account varied principally by drawing checks and the payment of that note.

Q. 392. There were practically no new deposits between October 13th and October 25th?

A. Very few, and they were very small.

Q. 393. Now, turn back from October 13th. Are you able to state the source of that fund which aggregated in the bank, $23,700 on October 13th, to which you have just testified?

A. I should say most of it was on account of round the world business.

Q. 394. That means payments had been made by tourists for their trips around the world?

A. Yes.

Q. 395. Payments in advance?

A. Yes.

Q. 396. And the profit which the company could make from this business of round the world was the difference between what it cost the company to carry the tourists and these deposits?

Mr. BAILEY: Is this redirect?

Mr. STUDLEY: If that is conceded, if it is conceded the bank knew——

Mr. BAILEY: Not conceding anything. I object—not redirect.

[Question admitted.]

A. Yes, it was; most of the profit of the business was derived from that source. There were other sources of profit.

Q. 397. Were there any other sources of profit on round the world business?

A. No.

Q. 398. At any time in October, 1910, had The Collver
94 Tours Company completed any of its contracts for round the world business on account of which deposits were made which were included in this balance of $23,700 on October 13, 1910?

A. No, it had not completed any of them.

Q. 399. Was the method in which you did your round the world business ever stated by you to any officer of the bank; if so, when, if you recall?

A. I don't remember of ever discussing the method of business. The nearest approach to that was the method as outlined in our printed matter, copies of which I think were given them from time to time.

Q. 400. Were any statements ever made by Mr. Bailey or by Mr. Cumner indicating that they knew the method in which the business was done; if so, you can give the statement; what statement, if any?

A. I am under the impression that statements were made, but I couldn't recite any particular one.

Q. 401. Some mention has been made of the letter of credit account. Do you recall, or do your books show, whether there were any funds in that account at the time when the notes were paid, which are now in question, in September and October, 1910?

A. I would have to refer to the books.

Q. 402. Which book do you want?

A. I think the ledger will show it. (Witness looks at ledger.) The books show a difference of about $10,000 in that account, but I think there must have been some items that were not posted, because it is not my impression that the letter of credit account would show that difference on that date.

Q. 403. Did the company have any assets at all in that account?

Mr. BAILEY: Just what does that mean?

Mr. STUDLEY: I understand the facts to be these: that the company had issued letters of credit, or had made such arrangements with directors for whose benefit these letters of credit were issued; that the company itself had no claim whatever upon this fund; that is to say, the company had issued letters of credit to the full amount of the deposits made with the Boylston National Bank, so that The Collver Tours Company had no assets whatever in that account the latter part of 1910.

95 Mr. BAILEY: I am prepared to admit that, and will say that in August, 1910, the balance of the letter of credit ac-

count had gotten down to $49.35, and remained at that amount until December, 1910, apparently the letter of credit business having gone elsewhere, or the letters of credit having been taken care of, so far as there were any.

Mr. STUDLEY: That is what I want.

Q. 404. What was that change made in the letter of credit business?

A. At what time?

Q. 405. After you made this arrangement with the Boylston National Bank in November or December, 1909, was there any change made in your letter of credit business?

A. Part of it was transferred in the early spring and during the summer to other banking sources.

Q. 406. You speak of other banking sources; what sources?

A. The American Express Company and the International Mercantile Marine; that was done by the bank through Brown Brothers & Company.

Q. 407. Now, Mr. Bailey inquired a few moments ago about the balance in your deposit account in the months of May and June, 1910. Can you tell me the sources of those deposits making up that balance that appeared in your deposit account in May and June, 1910?

Mr. BAILEY: Thought you covered all that.

[Question admitted.]

A. Principally from summer European business.

Q. 408. Will you kindly turn to the appropriate checkbook and tell me the amount of the deposit balance at the close of business on April 12, 1910?

A. $700.

Q. 409. Exhibit 2 shows that you obtained a loan of $5000 April 13th?

A. Yes.

Q. 410. Now, will you kindly tell me what the bank balance was at the close of business July 6th, 1910?

A. About $1100.

Q. 411. Did you obtain a new loan of $5000 on July 7th?

A. Yes.

Q. 412. What was the bank deposit at the close of business on July 13th, 1910, according to your deposit book?

96

A. About $4500.

Q. 413. You obtained a loan of $5000 on July 14th?

Mr. BAILEY: That is in evidence.

Mr. STUDLEY: Admitted I suppose?

Mr. BAILEY: Admitted.

A. I might correct the amount of the balance at the close of July 13th by saying evidently a check for $1400 dated July 13th was not drawn nor deducted until July 14th, so the balance would not have been sufficient to draw that until after that note was discounted.

Q. 414. To whom was that check drown, the $1400 check?
A. The American Express Company.
Q. 415. Do you know what it was for?
A. It was for a foreign remittance, a cable transfer.
Q. 416. What was the object of that cable transfer?
A. To send to the directors of parties.
Q. 417. For what purpose?
A. For the expenses of their party.
Q. 418. And the deposit was not sufficient to cover that until thi new loan was made of $5000?
A. No, it would not have been.
Q. 419. Now, will you turn to August 3d and tell me what th deposit was at the end of that day?
A. $3300.
Q. 420. On August 4th two new $5000 loans were made?
A. Yes.
Q. 421. What was the deposit at the close of business on Augu 4th?
A. $13,300.
Q. 422. Now turn to August 15th, and what was the balance a the close of business August 15th?
A. At the close of August 15th, $3500.
Q. 423. Had notes aggregating $10,000 to the Boylston Ban become due on August 16th?
A. It is dated August 15th here.
Q. 424. Notes became due on August 15th aggregating $10,000
A. Appears to be the 15th.
Q. 425. Then I will ask you what was the deposit at the clos of business August 14th?
A. About $900.
97 The COURT: Was that $10,000 paid by check or charge?
A. There is no record of a check here.
The COURT: About that time there was $10,000 renewed.

Mr. STUDLEY: The transaction is undoubtedly that $10,000 b came due and were not paid but renewed.

A. Old notes taken up and new ones issued.
Q. 426. Was the formality gone through of having the $10,00 actually placed to your deposit? You say new notes given and ol ones taken up. Was $10,000 placed to your credit for the ne notes?
A. Yes, I think the bank did that, especially as the entry is mad here of adding $10,000 to the balance. Later *is* is deducted.
Q. 427. Was there any check drawn for that $10,000?
A. No; I find no record of a check.
The COURT: Then why did you deduct it? Because you ha notice from the bank that they had charged it?
A. I think there was some form; some bank form must have bee sent.
Q. 428. Will you kindly turn to your record for September 5t and tell me what your bank deposit was at the end of Septembe 5th?

A. The 3d of September is the preceding day.
Q. 429. Last business day?
A. Yes.
Q. 430. What was the deposit at the end of September 3d?
A. About $2800.
Q. 431. And you had a note for $5000 falling due September 6th?
A. Yes.
Q. 432. What was done about that note?
A. It was renewed the same as the one preceding.
Q. 433. Now, what was the lowest point reached by your bank deposit according to your book between September 6th and September 12th? I will ask you also for the highest?
A. The lowest was $6.23.
Q. 434. On what date?
A. At the colse of business September 8th.

Mr. BAILEY: Wasn't it the middle? I understood from
98 your previous testimony that was the middle and at the end it was a little bigger.

A. There was a deposit made at that time which is not dated here. I cannot tell whether it was made on the 8th or 10th. The bookkeeper neglected to date that deposit.
Q. 435. What was the highest point reached between those dates I have stated, September 6th and September 12th—or between September 6th and September 11th inclusive?

Mr. BAILEY: The 11th was Sunday.

Q. 436. At the close of business the 10th how much was it?
A. That was not the highest.
Q. 437. What was the highest?
A. The highest was $2300.
Q. 438. On what date?
A. There were two dates about the same, one September 7th and September 10th.
Q. 439. At the close of business September 10th what was the exact amount of the deposit?
A. Do you want the exact figures?
Q. 440. In hundreds if you can?
A. It was $2400.
Q. 441. Was there a note for $5000 paid on September 12th?
A. Yes.
Q. 442. Apparently there must have been deposits on September 12th to meet it; does your deposit book show it?

Mr. BAILEY: The 10th, ask him about.

Q. 443. Was there a deposit on the 10th to meet that?
A. Yes, there was a deposit on the 10th of $7900, but there were checks drawn on the 10th which reduced that to $2400.
Q. 444. Was a deposit made on the 12th; and, if so, how much were your total deposits on the 12th?
A. $2700.
Q. 445. What was your deposit at the end of business September 12th according to your book?

A. The bank balance, do you mean?
Q. 446. Yes.
A. $113.
Q. 447. Was that after that note of $5000 had been paid?
A. Yes.
Q. 448. Now, coming to September 20th, what was your depo
at the end of September 20th, your bank balance?
A. About $6800.
99 Q. 449. At the close of business September 21st, what
the balance?
A. About $6500.
Q. 450. Was that after the payment of that note?
A. Yes.
Q. 451. Coming to September 29th, what was the balance?
A. About $6600.
Q. 452. What was the balance at the close of business Septem
30th?
A. About $700.
Q. 453. That was the balance after the payment of the note
$5000?
A. Yes.
Q. 454. At the end of October 1st what was the balance?
A. About $420.
Q. 455. Now, what deposits were made on October 3d; what
the total deposit on that date?
A. $4423.
Q. 456. Did that include the deposit of $2500 loan from
bank?
A. Loan from the bank?
Q. 457. Yes, $2500; the renewal?
A. No.
Q. 458. What were the checks drawn on October 3d, the agg
gate amount?
A. There was one check to the Boylston National Bank
$2537.92; that is the check which has the note beneath it: "
check given, note charged into account." That was the note abo
which we had the dispute.
Q. 459. What dispute?
A. I wouldn't say dispute, but misunderstanding. In oth
words, it had been charged into our account before we knew abo
it and it was necessary to change our books to agree with the ban
balance.
Q. 460. Mr. Bailey called your attention to the deposit balan
in June, which varied from $59,500 to $25,000 at various times
June. Can you tell me what became of those sums?
A. They were used to carry out the European contracts, and so
of them were used to pay the various notes as they came due.
Q. 461. How much preferred stock was there outstanding on M
12, 1910?
A. I would have to see the books.
Q. 462. Which book do you want?
A. I think the stock ledger will show—I have the regular ledge

that will show it (refers to ledger). It appears that there was $16,100 worth.

Q. 463. How much money was required to pay that three per cent dividend?

A. You mean what would be the dividend on that amount of stock?

Q. 464. Yes, exactly; it would be $483, would it not?

A. Yes, it would.

Q. 465. Was that amount actually paid in May, 1910?

A. I think the whole amount was; I could tell by referring to the books.

Q. 466. If it would be only a moment, I would like to have you look at the book and find out.

A. (Refers to books.) It wasn't paid on the 12th. No; there was but a portion of it paid, amounting to $279. The balance of that amount, I think, was credited to Mr. Collver, who was then away.

LEON COLLVER (sworn).

(By Mr. STUDLEY:)

Q. 1. What is your name?

A. Leon Collver.

Q. 2. You were formerly connected with The Collver Tours Company?

A. I was.

Q. 3. In what capacity?

A. President and treasurer.

Q. 4. And were you connected with the company from the beginning?

A. I was.

Q. 5. Do you recall the organization of the company?

A. Yes, I do.

Q. 6. Can you tell me how much stock was issued on account of good-will?

A. May I answer in my own way?

Q. 7. Until you are checked you may proceed.

A. Well, the capitalization was $100,000—$75,000 preferred and $25,000 common. All the common was issued to me, except what was necessary in a nominal way for the qualification of directors; therefore, the $25,000 represented the entire liability of the company in common stock; $10,000 of the preferred was issued to me on account of the estimated amount that I had spent personally in the business of Leon Collver which went into the make-up of The Collver Tours Company, so there was $25,000 of the common stock and $10,000 preferred, and $25,000 was reduced simply by $200 or $300 represented by the shares of the other directors, members of my family.

Q. 8. That made a total of $25,000?

A. $25,000 less the $200 or $300 for the qualification of the other directors—$300.

Q. 9. Now, do you know how that sum of $25,000 or $34,700 was arrived at as the value of the good-will?

A. I have the impression—I intended to cover that in my previous answer. The idea was that the ownership of the company was my own. There were no other claimants to that, and the $25,000 common stock therefore represented that, and the $10,000 of preferred stock—the good-will—represented the estimated amount of money that I had put into the previous business, the personal business.

Q. 10. I wanted to find out just how you arrived at the result that the good-will was worth $34,700. You state how you got at the $10,000, but I cannot see what the process was you went through to find this value of $25,000.

A. Well, I engaged a professional accountant—I forgot what he called himself—a man who made a business of making corporations—I forget his name now, a Scotchman,—and I took his word in all these things as to what should be done. He recommended a capitalization of $100,000, divided into $75,000 preferred and $25,000 common, and I took his opinion in all these things.

Q. 11. Now do you remember these loans from the Boylston Bank from time to time speaking generally?

A. Speaking generally, certainly.

Q. 12. When did you return from Europe in the fall of 1910?

A. September 22d.

Q. 13. Did you see somebody at the Boylston National Bank some time in the fall or early winter of 1910 in reference to a loan for the benefit of The Collver Tours Company?

A. I don't remember anything of that sort until just before the end.

Q. 14. When was that?

A. About the end of November—I can't give the exact date; about the last week.

Q. 15. Whom did you see?

A. Mr. Cumner, but not at the bank. I went to his office after bank hours.

Q. 16. Where did you see him?

A. At his other place of business; private place of business.

102 Q. 17. That office is somewhere in the city here?

A. Oh, yes.

Q. 18. Will you kindly state what took place at that interview as fully as you can recall?

A. Well, I pointed out to Mr. Cumner we needed money, needed a continuation, or rather a renewal of the credit we had previously possessed with them in order to continue business. He said that as trustee of the funds of the bank it was impossible for him to grant it—grant my request.

Q. 19. Will you kindly continue to state the whole conversation as nearly as you can remember it?

A. He said that at the time we were up to the $40,000 mark that the bank—his directors—had criticised him severely for carrying the credit so long on such intangible security, and it was necessary for him to refuse on that basis.

Q. 20. Have you stated all that you remember?

A. Oh, the directors had criticised him severely, and he had said

if they would leave it to him he would get the bank out; I think that is all that applies to the company that he said.

Q. 21. Did Mr. Cumner give any further reasons for not making the loan than what you have stated, so far as you remember?

A. I don't recall any other.

Q. 22. Did Mr. Cumner state that there was any difference between the financial condition of the company at the time of this conversation that you then had with him and the condition of the company in the summer?

A. I don't remember that was touched upon.

Q. 23. Prior to this talk in November with Mr. Cumner, do you remember whether or not Mr. Swain had been to the officers of the bank for a loan?

A. He had a short time before that, some time in the month,—my impression is it was not more than a week or two previous. I am not sure of the definite date, but my impression is something like a week or ten days before.

Q. 24. Now, I call to your attention Exhibit 2, being a list or schedule of loans that were made by the bank to your company from the beginning, and direct your attention to the latter part of 1909. You observe that that list shows that in the latter part of 1909 the balance of these loans was $25,000 and that loans
103 were renewed under date of November 18th and December 14th, 1909?

A. Yes.

Q. 25. Do you recall whether you had any negotiations with any officers of the bank relative to the renewal of these loans?

A. I had entire charge of that sort of thing, practically entire charge. I think I had entire charge until I left April 2, 1910, to take care of the European end of the business.

Q. 26. On the occasions of these renewals, one of $10,000 on November 18th and one of $5000 on December 14th, do you recall whether you saw any officer of the bank?

A. No, I don't remember the circumstances at all. Usually there was practically no discussion. There was a long time it was understood our line of discount was $25,000, and when we didn't exceed that the notes were renewed without question. There was quite a time it ran that way.

Q. 27. Before you went to Europe in the spring of 1910, did you have any discussion with any officers of the bank about your Ober-Ammergau business?

A. Well, in the winter the Ober-Ammergau business was a matter of general comment. We expected it would be a very glorious thing.

Q. 28. Did you have any discussion with the officers of the bank about it?

A. I don't remember a discussion. I only remember a statement was made more than once of the splendid progress that was being made and the probabilities that all our loans would be taken up out of the profits of that business and we would be well on the right side in addition. There was every indication of that fact.

Q. 29. Did you or your company transact summer European business prior to 1909?

A. Prior to 1909 only nominally—I don't think there was any substantial business before that. We issued a programme, but I don't think we got any business worth mentioning before 1909. It was February, 1909, I established the European department as a separate department and engaged a man and placed in charge of it in anticipation of the 1910 Ober-Ammergau business. We had the 1909 as rather a rehearsal to get things well going.

Q. 30. Was that stated to the bank or any officers of the
104 bank, that you were preparing for this Ober-Ammergau business?

A. Oh, yes; I don't remember a definite statement, but I think it was generally understood that we expected great things in the Ober-Ammergau year.

Q. 31. Now, in February and March, 1910, two notes of $10,000 each, or on each occasion two notes of $5000, were apparently renewed at the bank. Do you recall whether you had any negotiations with the bank to get these?

A. I don't recall any negotiations, but I have no doubt I was the one that went to the bank, because I think I took care of that sort of thing until my departure to Europe; don't remember the circumstances.

Q. 32. Do you recall what took place, or what was said on these occasions?

A. No, I do not.

Q. 33. You were in Europe from April 2d until September 22d?

A. I sailed April 2d and arrived home September 22d?

Q. 34. And while you were away Mr. Swain was in charge of this end of your business in Boston?

A. Yes.

Q. 35. After you returned in September did you personally have anything to do with the payment of the notes which were paid?

A. No.

Q. 36. Do you recall cabling for money from Europe in the summer of 1910?

A. I do.

Q. 37. How many times?

A. I can't tell how many times—a number of times.

Cross-examination by Mr. BAILEY:

X Q. 38. You said that in 1909 you began in various ways preparing for the Ober-Ammergau business of 1910; that is right?

A. Yes, that is right.

X Q. 39. That included some expenses?

A. It included a good deal of expense for advertising. We were putting out printed matter in lots of from 25,000 to 100,000. We were making a definite investment for the Ober-Ammergau season.

X Q. 40. That wasn't expected to come back in July?

A. That was expected to come back in 1910.

X Q. 41. Going back a moment to 1907 when the loan
105 of $4000 was made, that was made with the understanding it would be taken care of during the season of 1907?

A. I don't doubt it was.

X Q. 42. And it was taken care of, was it not, in October, 1907, at the end of the season?

A. Apparently October 1st and 15th, in two parts.

X Q. 43. Then you didn't need to borrow any more until the beginning of the season of 1908?

A. February 24, 1908.

X Q. 44. Then you borrowed $6500?

A. Quite so.

X Q. 45. And it was understood that would be taken care of that fall?

A. Yes.

X Q. 46. And it was taken care of?

A. It was taken care of.

X Q. 47. That was paid in September and October, 1908?

A. Yes.

X Q. 48. Now, in 1909, was it the understanding quite early in 1909 that the 1909 and 1910 business, so to speak, would make one season, that is, that you were getting ready for the Ober-Ammergau business in 1909, and that season wouldn't be completed until 1910?

A. Yes, that surely was my understanding, and I don't doubt the officers of the bank understood that, because we were full of the spirit of 1910 early in 1909, the European department having been established in February, 1909, with that in view.

X Q. 49. And coming to the early part of the year 1910, the prospects were bright, were they, for the season?

A. They were splendid. I remember when I left Mr. Swain remarked that when I should return in the fall the bank officers would be at the boat to meet me with a brass band, things would be so different. They were not, but that was the prophecy.

X Q. 50. You knew there were two accounts at the bank, one the general deposit account and one the letter of credit account?

A. Yes, I remember that.

X Q. 51. And the Boylston National Bank, that was the only bank where you had a general deposit account?

A. Yes, it was the only bank The Collver Tours Company had an account in.

X Q. 52. And the only bank where you were getting notes discounted?

A. Yes, it was.

106 X Q. 53. Now, when was it when you began to do some of the letter of credit business through the American Express Company and some other concern?

A. I can't answer that. I think that came about when I was away.

X Q. 54. In 1910?

A. When I was away, according to my remembrance.

X Q. 55. And as far as you know that was done because Mr. Swain thought well of doing it that way, was it?

A. I think his idea was—or my understanding of his idea was that it would be more profitable by paying less commission.

X Q. 56. Now, so far as you knew and understood, this genera. deposit account was conducted in the usual way, deposits made ana checks drawn in the usual way?

A. Yes, quite so—knew nothing to the contrary.

X Q. 57. And you say it was towards the end of November 1910 you had this talk with Mr. Cumner when he declined to make new loans?

A. Yes, towards the end of November.

X Q. 58. And that came as something of a surprise, did it?

A. It did up to Mr. Swain's interview about a week or ten days earlier.

X Q. 59. So you had had no intimation until November from the bank they were not going to make fresh loans?

A. I didn't take it that there had been a direct intimation. Mr. Cumner on one occasion, if I recall correctly, had suggested that a statement be made of the company's condition.

X Q. 60. That was in October or November?

A. Some time during the fall.

X Q. 61. You don't exactly know when?

A. I don't know exactly when. After I got back September 22d I was home a short time, and then it was understood between Mr. Swain and myself that I should go out to the middle West on what we call a drumming expedition—trying to get new business; I don't recall dates with reference to particular things, but my remembrance is they wanted a statement made before another, or other loans were made.

X Q. 62. And that, as near as you can tell, was some time
107 in October?

A. It must have been in October, because September 22d I returned from Europe.

X Q. 63. Do you remember when you went West?

A. That is what I don't remember—that is precisely where my haziness is, on that point.

X Q. 64. Any entry in the cashbook that would enable you to fix it?

A. It is quite possible the check for my expenses would be there.

X Q. 65. You might glance at the stub checkbook and see if that would indicate when you went away and when you got back.

A. I find on September 29th a check on "account of traveling expense L. C."

X Q. 66. That was when you started?

A. I must have started within a day or two.

X Q. 67. Gone about how long?

A. I think I was gone about a fortnight; I remember definitely I was here October 12th, Columbus Day—the holiday—back before that.

X Q. 68. The statement that Mr. Cumner wanted, do you recall whether that had been made up, or was made up?

A. I don't remember ever made up. It was our hope—it was our hope, I won't say full expectation, to get sufficient business in Oc-

tober and November parties, and for January and February parties, so that we should get along without renewals; that was our hope.

Redirect examination.

(By Mr. STUDLEY:)

Q. 69. You said a moment ago in answer to one of Mr. Bailey's questions that you expected to get back the money for advertising spent in the Ober-Ammergau business in 1909 in 1910?

A. Yes.

Q. 70. What time in 1910 did you expect to get it back?

A. Principally in May, June and early July, with one big contract in August which we already had, as I remember,—the Knights of Columbus party.

Q. 71. Did you have any talk about that with the officers of the bank as to when the Ober-Ammergau business would take place; what time in the summer?

108 A. I don't remember any definite statement, but I think it was understood—I don't think there was any doubt about the time the business would move—the holiday season.

Q. 72. You said that Mr. Swain told you that the prospects were so good that the bank officials would be at the boat with a brass band to meet you?

A. Yes.

Q. 73. Just what was the occasion of that statement?

A. The occasion was we had hundreds of people already booked and we expected hundreds more—expected an enormous business.

Q. 74. Just why should that cause jubilation to the bank?

A. Because of their friendly interest in us I should say.

Q. 75. Was it a fact that the bank officials were somewhat anxious because notes of $25,000 had not been paid up the preceding fall?

A. I didn't gather that impression. That was Mr. Swain's ultimatum—not the bank officials'; not that they were anxious, but there was a feeling of good-will and he thought they would rejoice in our success.

Q. 76. At this early talk in the year 1910, that is, earlier than the time when the loan was refused, you stated Mr. Cumner said before any new loans were made he wanted a statement made by The Collver Tours Company?

A. I am quite sure there was some such intimation to Mr. Swain and myself.

Q. 77. Do you recall whether any notes were signed by you in Europe in 1910 and sent to Mr. Swain here for use at the bank?

A. I have forgotten; I believe Mr. Swain did send some blank notes for me to sign; I haven't thought of that until this moment and I am a trifle hazy about it. I believe there was an instance of that sort.

HERBERT B. BAILEY (sworn):

(By Mr. STUDLEY:)

Q. 1. What is your name?

A. Herbert B. Bailey.
Q. 2. And your residence?
A. My citizenship is in Quincy—not my residence.
Q. 3. And your occupation, Mr. Bailey?
A. Assistant cashier of the Boylston National Bank.
109 Q. 4. How long have you been there?
A. About twenty-seven years.
Q. 5. Been with the bank twenty-seven years, and how long in your present position?
A. I couldn't say, about——
Q. 6. A good many years?
A. About ten years or twelve.
Q. 7. Familiar with banking business?
A. Why I thought I knew a little something about it.
Q. 8. Did you have charge of The Collver Tours Company account in behalf of the Boylston Bank?
A. No, sir.
Q. 9. Did you talk with representatives of The Collver Tours Company when they came in?
A. Sometimes I did.
Q. 10. Unless something special came up did you pass upon the question of renewal of their notes?
A. No.
Q. 11. Was that referred to somebody else?
A. It might not have been referred in each instance, but it was usually referred previously, you understand; I had my instructions.
Q. 12. Do you recall an interview in April, 1910, between yourself and some representative of The Collver Tours Company?
A. My memory as to dates is very poor indeed.
Q. 13. Let me hand you Exhibit 4 and see if you can identify that paper.
A. I couldn't definitely do it in any other way than that it appears that is my handwriting at the bottom.
Q. 14. You say you wrote it?
A. I say it appears to be mine—I think it is.
Q. 15. When did you place that on the bottom?
A. I don't know. It says "April '10"—all I know about it. I couldn't tell you the date.
Q. 16. With that handwriting at the bottom before me, can you say whether or not you have seen that paper before?
A. That I have seen it previous to this date? Certainly I have.
Q. 17. Did you see it in April, 1910?
A. I don't know.
Q. 18. Did you see it at any time before the bankruptcy of The Collver Tours Company?
A. I think I did.
Q. 19. Can you place that anywhere between April and December?
A. No, sir, I can't place any date when I saw it.
Q. 20. Did you read it.

A. I did.

110 Q. 21. Do you recall the occasion of that being handed to you, if it was handed to you?

A. I do not.

Q. 22. You heard Mr. Swain's testimony?

A. Yes, that he testified here.

Q. 23 As he testified here?

A. Yes.

Q. 24. Do you doubt that was handed you on April 13th as Mr. Swain testified?

A. Well, if I can't remember what date it was handed to me, why I couldn't say whether I doubted it was on that date or not. I think Mr. Swain has testified to what he believes to be the truth.

Q. 25. You say at some time you did read it before the bankruptcy proceedings?

A. Yes.

Q. 26. Now, I call to your attention that item of good-will. Did you consider that?

A. Not seriously.

Q. 27. What do you mean by that?

A. Because I didn't think it was a fair estimate of what the good-will of that company was worth.

Q. 28. That is a bit indefinite. Did you think it was too much or too little?

A. As to my opinion, I thought it was altogether too little.

Q. 29. Altogether too little?

A. Yes, sir.

Q. 30. Now coming to the item "Foreign offices", did you inquire what that meant?

A. Not at all.

Q. 31. Do you know what it meant?

A. I don't think I did.

Q. 32. Did you consider it an asset?

A. Well, I will tell you——

Q. 33. Won't you kindly answer me?

A. I didn't consider it at all. I didn't consider it a statement; just simply read it over in a casual way and let it pass, because I didn't consider it really a statement; didn't see anything about it to indicate it was anything more than a memorandum.

Q. 34. Didn't consider that at all?

A. Not in the light of a statement.

Q. 35. I call to your attention the item "Office fixtures $1850"; did you consider that?

A. Not especially.

Q. 36. Did you observe that the item of deficit December, 1909, was $44,896.65?

A. I read the whole document.

111 Q. 37. You observed that item there?

A. Yes.

Q. 38. Did that have any weight with you as to the value of the good-will?

A. Not in the least.

Q. 39. Not in the least?

A. No.

Q. 40. Did you see this statement Exhibit 1, copy of statement filed at the State House on March 31, 1910?

A. I didn't see anything of this sort. All I saw was a little clipping from a paper about an inch and a half long and five-eighths of an inch wide.

Q. 41. A summary of that statement?

A. I don't know.

Q. 42. Got that clipping?

A. No, sir; I don't know where it is. I thought it was with the rest of the papers, but it seems to be missing.

Q. 43. When did you see that?

A. I think it was the summer of 1910 sometime; I couldn't say when.

Q. 44. Do you recall what newspaper it was, or what paper?

A. I supposed it was cut from the "Banker and Tradesman".

Q. 45. Do you happen to know that the "Banker and Tradesman" frequently publishes abstracts of certificates of condition filed by corporations at the State House?

A. Yes.

Q. 46. Do you make a practice of reading those when they relate to corporations that have borrowed money from your bank?

A. That paper is looked over by another person at the bank, and if there is anything that interests other officers it is handed to them.

Q. 47. Do you think that is the way that clipping came to your hands?

A. I do. Can't say it came to my hands; might have been presented to me to read.

Q. 48. Came to your attention?

A. Yes, sir.

Q. 49. Some time in the summer of 1910?

A. I think so; couldn't say for certain.

Q. 50. Did you observe then that it showed an item of loss of $44,896?

A. I couldn't remember what the statement said.

Q. 51. Did you compare it with the memorandum you had on file furnished you by the company?

A. Probably not.

Q. 52. Did you customarily do that?

A. I did not; no.

Q. 53. Does any person connected with your bank, so far as you know?

A. I think likely.

112 Q. 54. You have been there twenty-seven years; don't you know?

A. No, I do not.

Q. 55. Did you see the statements of The Collver Tours Company filed at the State House, certificates of condition, for years earlier than 1909?

A. Only that one statement, all I have seen.
Q. 56. That is the only one?
A. Yes.
Q. 57. Did you hear about this Ober-Ammergau business?
A. I did.
Q. 58. In the winter of 1909 and early part of 1910?
A. Yes.
Q. 59. From what sources?
A. From Mr. Collver and Mr. Cumner; I think both.
Q. 60. Were you familiar with The Collver Tours Company account from the time you began to loan them money in June, 1907?
A. I was somewhat familiar with it.
Q. 61. How far was that under your jurisdiction, or within your duties?
A. In so far as I was instructed by the president.
Q. 62. What were those instructions?
A. Well, the instructions were the placing of a limit of credit and instructions as to what should be done generally as notes matured.
Q. 63. Did you talk with officers of The Collver Tours Company from time to time about their business?
A. More or less; yes.
Q. 64. Did you know the way in which their business was conducted?
A. Only in a general way.
Q. 65. Did you know it in a general way?
A. I don't know as I ought to say that I know, because there were many things have come to light that I didn't know anything about before. For instance, I didn't know where they changed their letter of credit.
Q. 66. Did you inquire about it?
A. I think I was told that some of it was done through American Express and some through Brown Brothers, but I didn't know about this other company.
Q. 67. Ever hear of the International Mercantile Marine Company?
A. No; today is the first time I ever heard it.
Q. 68. Never heard of that company before?
A. No, sir.
Q. 69. Know what that company does?
A. I do not.
Q. 70. Ever hear of the steamship trust?
A. Does that bear on the case?
113 The COURT: That is rather remote.
Q. 71. Did you know that the tourists who went on the Collver tours paid for their tours in advance?
A. I did not know it. I understood that in some instances that was the case.
Q. 72. Was it so stated to you by the officers of the company?
A. I couldn't say. I think I gathered my information from the circulars mostly.

Q. 73. Have you any of their circulars except that "Investment Opportunity" which has been offered as Exhibit 7?

A. I haven't any here. Whether I could find them or not I don't know—possibly could.

Q. 74. Did you keep as an officer of the bank the papers relating to this particular account?

A. Some of them, but I know what I have in mind is the very elegant one that was published as an advertisement for round the world tours. I think it was printed in 1909—I am not sure. I simply kept it for my own personal interest because I have been a traveller myself and I enjoy looking at the illustrations and keeping run of these things in that way.

Q. 75. Was it your duty as an officer of the bank to find out what you could about The Collver Tours Company, or didn't that come within your jurisdiction?

A. Why, I never had instructions to that effect.

Q. 76. Aside from instructions, did you make that your duty?

A. I did somewhat.

Q. 77. You understood that these Ober-Ammergau tourists were going to Europe in the spring of 1910?

A. I don't know just the time of year—I understood they were going in time for the play.

Q. 78. Do you happen to know when the play was performed?

A. No, I couldn't say; not without referring to circulars and things.

Q. 79. Was it a part of your general knowledge that such tourists would be likely to leave in May and June, 1910, for the most part?

A. No, sir; I didn't consider it came under the head of bank business just when they left.

Q. 80. And never inquired?

A. Why, I kept run of it more or less. I also knew there
114 were all kinds of tours arranged, and some went early and some just in time for the play, according to how much they wanted to see before or after they went there.

Q. 81. You recall that these notes were renewed from time to time in the summer of 1910?

A. Yes, sir.

Q. 82. And Mr. Swa[illegible]aw you usually about these renewals?

A. Some of them.

Q. 83. Were there any of these renewals about which Mr. Swain didn't see you?

A. I couldn't tell you—year and a half ago.

Q. 84. I mean those which were renewed?

A. I couldn't say whether I saw him every time or not.

Q. 85. Did you follow the amount of their deposit with you?

A. More or less.

Q. 86. Was that a part of your duties?

A. I can't say it was a part of my duties. I wasn't instructed to look after those particularly.

Q. 87. Did that duty fall upon anybody at the bank?

A. Not particularly.

Q. 88. Did Mr. Swain see you in November, 1910, in regard to a loan?

A. I don't remember.

Q. 89. You remember some time the corporation made an assignment?

A. I heard that they did.

Q. 90. Do you recall whether prior to that time Mr. Swain saw you in reference to the loan?

A. I do not; that is, in the fall. Of course in the summer once or twice, or might be several times, we talked the matter of loans over, but I couldn't say what dates, or just what particular loans.

Q. 91. Did you learn of any change in the condition of The Collver Tours Company between April, 1910, and November, 1910?

A. Change in what?

Q. 92. In the financial condition of The Collver Tours Company?

A. Why, no; I don't think so.

Q. 93. So far as you know, did any officer of the bank?

A. No, I don't think so.

[Close of direct examination.]

(By the COURT:)

Q. 94. Did you have any talk with Mr. Collver about loans at any time?

A. Yes, sir, I did.

115 (By the COURT:)

Q. 95. Do you recall any conversation in September?

A. Yes, sir.

(By the COURT:)

Q. 96. What was that?

A. He came in just after he returned from Europe and said that he came in just to pass the time of day. And later on there was an appointment made by Mr. Cumner for Mr. Collver to come and talk the matter of his business over, as I understood.

Mr. STUDLEY: With Mr. Collver?

A. Yes. At least Mr. Cumner asked for an appointment with Mr. Collver, and Mr. Collver came and Mr. Swain came to the bank on the date appointed, and Mr. Cumner asked me to come in and hear what was said, and almost the first words that Mr. Collver said were "We don't need any money, Mr. Cumner," and upon that there wasn't much said.

Cross-examination.

(By Mr. BAILEY:)

X Q. 97. Can you fix whether that was October or November?

The COURT: Fix it as near as you can.

X Q. 98. You spoke about his coming in to pass the time of day; when was that?

A. That was within a week after Mr. Collver's return.

X Q. 99. When was the other talk?

A. I couldn't say. It was some time after that, some number of days—I couldn't say how long.

X Q. 100. Could you tell whether before Mr. Collver went West on the 29th of September or after his return?

A. I don't know—I don't recall—I knew he had gone West. I heard him testify to that fact just now, but I don't recall myself.

X Q. 101. You have given us the best you can the time when this second talk was had?

A. I have; yes, sir.

X Q. 102. Can you fix it whether it was before or after the 14th of October when the last note which was collected, or paid, matured?

A. No, I cannot.

X Q. 103. Or whether it was before or after October 3d when the note was partly paid and partly renewed?

116 A. I couldn't say that. There was no particular note in question, as I remember it, when this interview was had.

X Q. 104. Do you recall whether at that interview Mr. Cumner said to Mr. Collver that the bank would like a statement?

A. I do not—think he didn't at that interview—there was no occasion. He said he didn't want any money, and as far as I was concerned I thought he had found some money elsewhere or had concluded to sell stock, and then the fact that he had changed the letter of credit account from us to some other place where it was more profitable, and such indications as those, I felt he had probably made some connection or possibly gone to some other bank. I certainly thought he was in funds and didn't need to borrow further; that was as I understood.

X Q. 105. Do you know what the amount of the bank balance was, the amount of their deposit with you, along from the 10th of October to the 25th of October? Do you know the amount of their bank balance?

A. Only as it has been recorded.

X Q. 106. Did you keep at all informed during that period what the deposits were?

A. I did.

X Q. 107. You may look at this transcript of the bank account and see if it refreshes your memory, and see if you in a general way knew that their balances were at that time upward of $15,000?

A. Yes, sir.

X Q. 108. Now that you have that in your hand won't you tell us what that paper is and what it is taken from?

A. This is a transcript made by two bookkeepers; that is, some made by one bookkeeper and some by another, and they were asked to copy very carefully the account upon these papers as they appeared on the books of the bank.

X Q. 109. What does it purport to show?

A. This column here (indicating) shows the balance at the close of business each day.

X Q. 110. Take the next column; that is the date?

A. Yes; September 15, 1910.

X Q. 111. And goes backwards?

A. Goes backwards.

117 X Q. 112. Now, the next column shows what?

A. This is the balance.

X Q. 113. Beginning of each day or end of each day?

A. End of each day.

X Q. 114. What does the next column show under head of "checks"?

A. This (indicating) would indicate the morning balance, this (indicating) checks and deposits for that day, this (indicating) balance at close of business.

X Q. 115. Then under date of the 16th (indicating) that balance indicated the balance at the beginning of that day?

A. Yes, beginning of that day.

X Q. 116. Now, the next column headed "checks," what does that show under each day?

A. These figures in this column (indicating) are the detail of the checks; the footings are carried into this column here (indicating).

X Q. 117. Showing the amount of the checks for the day?

A. Yes. These red ink figures indicate checks coming through the clearing house, and the black those that are paid in cash over the counter or come from the receiving teller.

X Q. 118. Next column indicates deposits?

A. Indicates deposits for the day, and there is one instance (indicating) where there were three deposits in a day.

X Q. 119. These go down day by day?

A. They do.

X Q. 120. I call your attention to September 21, 1910, in black ink, $5000. That indicates a check of $5000?

A. It does.

X Q. 121. Coming down to the date October 3d, in the column "Deposits" I find 2462.08 with the word "dis." What is that?

A. That indicates the proceeds of a $2500 note discount taken out, bank discount.

X Q. 122. That is, you credited The Collver Tours Company with the amount of the discount of their note discounted by you on that day?

A. Yes, sir.

X Q. 123. Going back to the date September 6, 1910, in the column headed "Checks," I find in black ink $5000 with the letter "N" before it; what does that mean?

A. That means it was a note charged on that date.

118 X Q. 124. A Collver Tours Company note which was then charged to their account?

A. Yes, sir.

X Q. 125. Will you tell us what the custom of the bank was about the handling of notes which were payable to the bank where the maker of the note was a depositor and had a deposit account with the bank?

A. We were accustomed to offset the account with the note on the day it was due.

X Q. 126. Whether with or without checks; suppose that the customer didn't give you a check for the amount of the note when it matured, then what was the custom?

A. The custom was to charge it just the same, because these notes were all made payable at the Boylston National Bank, which we consider in our business equivalent to an order on the bank when the note becomes due to have it offset on the client's account.

X Q. 127. Was that the custom with customers generally?

A. Yes; made no exception in The Collver Tours account. We did business with them as we did with all others.

X Q. 128. Now, suppose that the customer on the day a note matured gave you a check for the amount of the note, what then?

A. Well, we passed the note to the party that passed in the check. Some people like to have it that way and some people do not care. Sometimes a check is given and sometimes not—ask the customer which they would rather do. They often express a preference, and if note is paid and the customer doesn't want it back until the end of the month it comes back with the rest of the account just the same as a check or any other charge that may have been incurred.

X Q. 129. Now, let me ask you if there was any conversation with Mr. Swain or Mr. Collver, or any understanding or agreement of any sort, that the deposits which were made in this general account in 1910 should be otherwise than in the regular course?

[Mr. Studley objects—two questions.]

Mr. BAILEY: I was always led to believe the way to prove a negative which you had a right to expect could be proved, was to make a leading question and make it as comprehensive as I could, but I am entirely content to divide it.

The COURT: Perhaps it can be divided after luncheon.

119 X Q. 130. Was there any conversation between you and Mr. Collver or between you and Mr. Swain in regard to the general deposit account, that the deposits made should be otherwise than in the regular course?

A. Not at all.

X Q. 131. Or that they should not be subject to check in the regular way?

A. Not for a minute.

X Q. 132. Was there any understanding of any sort between you and those gentlemen that that account should be other than a general deposit account in the regular course?

A. None whatever.

X Q. 133. Or that checks drawn against it should not be honored?

A. There was no such understanding, and every check drawn against it was honored; there was never a check sent back dishonored.

X Q. 134. Now, I ask you about these transcripts from the book. What you said about the one I showed you, would that apply to these other pages going to 1907?

A. It does.

Mr. BAILEY: Now, I would like to offer these, and I am entirely content to have my brother send and have somebody examine the books, or have them go in subject to any corrections which an examination of the books would show.

X Q. 135. You understand these to be correct transcripts of the book?

A. Oh, yes; no reason why they should not be, because the bookkeepers I had do that didn't know what they were taking them off for; that is, they had no interest in the matter, you might say.

X Q. 136. Now, the bookkeepers, one of them with you now?

A. Yes, sir; one is.

X Q. 137. And the other one is somewhere in the Commonwealth?

A. I think so.

Mr. STUDLEY: I am content these transcripts should go in with the limitations suggested.

[Exhibit 13. Sheets beginning February 6, 1909, and down to December 2, 1910—transcript of account of The Collver Tours Company.

Exhibit 14. Sheets from June 1, 1907, and continuing to
120 February 5, 1909—transcript of account of The Collver Tours Company.]

X Q. 138. Now, Mr. Bailey, does that transcript of these books covering that period show all the business that was done in connection with the deposits and withdrawals in that account?

A. Yes, sir; to take the letter of credit account out, it does.

— Q. 139. Now, I will ask you about this letter of credit account. I show you two sheets so as to refresh your memory. Was that a special account, kept separate from the other?

A. That was.

X Q. 140. And when did that begin as a separate account?

A. One, May 12, 1909; another, July 1, 1909; another November 24, 1909.

X Q. 141. The one that began November 24, 1909, how long did that continue?

A. It continued in use to the last of August, 1910.

X Q. 142. And whether or not this transcript shows all the deposits and all the withdrawals?

A. It certainly does; they do.

X Q. 143. And the balances, the same as in the other?

A. Run in the same way as the others.

[Exhibit 15. Three letters of credit accounts.]

X Q. 144. Now, you were asked by Mr. Studley whether after April, 1910, you noticed or knew of any change in the financial condition of The Collver Tours Company, and, as I remember, you said you did not. What do you say on reflection in regard to that, whether you did notice anything?

A. Well, I considered the company——

X Q. 145. No; just what you noticed, if anything, after April,

1910, as to its financial condition that was different from what it was before?

A. They had some very large deposits, if that is what you mean by question of change.

X Q. 146. Whether or not you were informed in a general way of the amount of their deposits in May and June?

A. Yes.

X Q. 147. At the time the notes held by you were paid, either by check or by charging same into the account, did you believe or understand that anything was being done that was going to give you a preference over other creditors?

121 [Mr. Studley objects.]

The COURT: The issue here is whether the bank had reason to believe that the effect of these payments would work a preference. I don't know why that direct question may not be put in that issue, for what is it worth.

[Mr. Studley excepts.]

A. Not at all; we simply did as we handled other people's accounts —just the same way.

Redirect examination.

By Mr. STUDLEY:

Q. 148. You said a few moments ago that there was no understanding with The Collver Tours Company that their account would be handled any differently from any other depositors' account?

A. No, sir.

Q. 149. Was the subject of how their account was handled ever a matter of conversation between you and any officer of The Collver Tours Company?

A. No, sir.

Q. 150. The situation, then, is there was no understanding?

A. No more than with anybody that opens an account. Sometimes they ask if they can open a checking account, and we say yes they can, and that is all there was.

Q. 151. And that is all there was to that?

A. All there was to that.

Q. 152. Now, you say you knew of one change in the condition of the company, you knew they made large deposits?

A. Yes.

Q. 153. Did you also know that they made large withdrawals that took the whole of these large deposits?

A. Why, I did not practically.

Q. 154. Did you follow their bank account from time to time to see what their balance was?

A. I did.

Q. 155. And did you observe, although they had these large deposits in May, that the first of July their deposits were down to only a few hundred dollars?

A. I did not notice they were low in July.

Q. 156. Did you observe in July that they were below the amount they were in June?

A. Yes, I had noticed it there (Exhibit 13).

122 Q. 157. Did you notice it before you saw this sheet (Exhibit 13)?

A. If I noticed at any time I don't remember—probably did because I went through the account more or less.

Q. 158. I would like to know whether you did follow their deposit from day to day?

A. I did not, from day to day.

Q. 159. How often did you look at it?

A. As often as I felt inclined.

Q. 160. Now, as a practical matter, how often was that?

A. It is impossible to answer.

Q. 161. Once a month?

A. I had no regular time.

Q. 162. Did you do it as often as once every two months?

A. I had no regular time.

Q. 163. Did you do it on occasions when notes fell due?

A. I couldn't say.

Q. 164. I think you said it was the custom in your bank to treat a note of a depositor which was payable at your bank exactly as a check upon the date when the note became due; is that so?

A. Yes.

Q. 165. What do you do in your bank if a depositor draws a check for an amount which is greater than the amount of his deposit at any time?

A. Sometimes we return them to the parties presenting them, and sometimes we pay.

Q. 166. Have you any settled custom?

A. No, sir; we use our judgment on that.

Q. 167. Do you ever pay a check in part, so far as funds allow?

A. Either pay the whole check or none at all.

Q. 168. I call to your attention that on October 3 a note for $5000 came due, 1910. Did you treat that like a check?

A. Treated it like a check; yes.

Q. 169. Did you?

A. I said so.

Q. 170. What did you do with it?

A. Charged it into the account the same as we would a check.

Q. 171. Did that make an overdraft?

A. There was no overdraft at the close of business that day. That is when we look for our overdrafts, at the final settlement.

123 Q. 172. Was there an overdraft any time during the day?

A. Can't tell you; I think so.

Q. 173. Was the deposit sufficient to meet that note?

A. Deposit and discount was sufficient.

Q. 174. Discount made before or after note became due?

A. We consider a note becomes due the first thing in the morning as we open business; any note due that day is payable when the bank opens in the morning.

Q. 175. Do you treat it as a check at that time, when the bank opens for business?

A. I should say so; yes, sir.

Q. 176. When the bank opened business that morning the deposit of The Collver Tours Company wasn't quite $5000?

A. No, it wasn't.

Q. 177. What did you do?

A. Waited until it was good before we charged it.

Q. 178. Did you have any talk with them about that?

A. I couldn't tell you.

Q. 179. Do you recall that transaction—that $2500 transaction?

A. I do not; that was made by the president, I think.

Q. 180. Think made by the president?

A. I think so.

Q. 181. What is the basis of that inference on your part?

A. Because of the note having been split and half of it renewed.

Q. 182. Do you know why it was split?

A. For the accommodation of The Collver Tours, I understand; I don't know the particulars.

Q. 183. Did it occur to you at the time they didn't have enough money to pay it?

A. Not at all; that wasn't the reason at all; it was renewed for the accommodation of The Collver Tours Company.

Q. 184. Were there funds enough in the bank to pay it without having the new discount?

A. There were not that day.

Q. 185. That was the day when the note was due?

A. Yes,—wait a moment—just one moment; I am wrong about that. Yes, at the close of business the 3d this balance would indicate there was money enough.

Q. 186. When?

A. On October 2d; certainly there was money enough there.

124 Q. 187. According to this statement which you have offered, which was put in through Mr. Bailey, the amount stated in your first column is, I understand you to say, the amount of the total deposit on the morning of each day at the opening of business?

A. Yes; that is right.

Q. 188. At the opening of business October 3d the amount of their deposit was $1453.21; is that so?

A. Yes, sir.

Q. 189. And the amount on October 4th was $2747.28?

A. That is the close of business on the 3d.

Q. 190. Close of business on the 3d?

A. Yes; that would have paid the note, if we had wanted them to.

Q. 191. No; that is October 1st?

A. $5000 paid, and we renewed $2500, and if we hadn't renewed it they would still have had something like $300.

Q. 192. At the close of business on October 1st, October 2d, October 3d or October 4th was there sufficient money in the bank to pay a note of $5000?

A. There was sufficient on October 3d, at the close of business October 3d.

Q. 193. How much was there at the close of October 3d?

A. $2747.28.

Q. 194. Was that sufficient to pay $5000?

A. It had been paid already on that day.

Q. 195. Let me make the question perfectly clear. At the close of October 1st, October 2d, October 3d or October 4th, was there sufficient money in the bank to pay a note of $5000?

A. Yes.

Q. 196. On what day?

A. On October 3d.

Q. 197. What was the amount at the close of business October 3d in the bank?

A. $2747.28.

Q. 198. I am asking if there was enough to pay a note of $5000?

Mr. BAILEY: There wasn't a note for $5000, only a note for $2500.

Q. 199. Is it a fact that a note of $5000 became due October 3d?

A. Yes.

Q. 200. When that became due was there sufficient in the bank to meet it?

A. No, sir.

Q. 201. Do you know now why that note was not paid when it became due?

A. It was paid.

125 Q. 202. Part of it renewed?

A. New note was issued for $2500.

Q. 203. Do you know why the note wasn't all paid off?

A. I told you it was for the accommodation of The Collver Tours Company, because we had no intention to force them to pay their note. They desired to have that $2500 extended, and if we had been afraid of them we would probably have asked them to pay in four or five days, as they could well have done as the balance shows.

Q. 204. You said that you didn't know or believe a preference would be caused by such payments?

A. I have; certainly.

Q. 205. Do you know what "preference" means?

A. Well, I have an idea I do. Perhaps it would be well to consult a dictionary.

Q. 206. I wish you would state what you meant when you used the term in answer to Mr. Bailey's question.

A. I had the idea it meant that Mr. Collver was paying the Bolyston Bank at the expense of his other creditors; that is my idea of it.

Q. 207. Did it occur to you that it meant that if you were paid —if all Mr. Collver's assets were distributed equally among his creditors at that time and this payment made to you, that you would get more than the other creditors received?

[Mr. Bailey objects.]

The COURT: The definition is contained in Section 60.

Mr. STUDLEY: The effect of the enforcement of a preference would be (reading from Section 60) "to enable any creditor to obtain a greater percentage of his debt than any other such creditor of the same class".

Q. 208. Did you have that in mind as the meaning of "preference" when you answered Mr. Bailey's question?

A. I don't see any material difference between that definition and mine.

Q. 209. Now, you knew that the bank had been making these loans to The Collver Tours Company for some time?

A. Yes.

Q. 210. And you had seen this statement of "April '10", which is Exhibit 4?

A. I saw that memorandum.

Q. 211. Had you seen that memorandum before October—you said you couldn't place it?

A. October 1910? I told you I probably saw it, but the date I couldn't say—I couldn't place the date.

126 Q. 212. Did you know of any other fact in regard to the condition of The Collver Tours Company—regarding any change of The Collver Tours Company—except these large deposits that you mentioned between those dates?

A. I learned at one time that the profits were not apparently coming out quite as large as they expected it.

Q. 213. When did you learn that?

A. August 4th I think it was.

Q. 214. How did you happen to learn it?

A. Mr. Swain told me.

Q. 215. What was the occasion of his telling you?

A. Talking over the situation.

Q. 216. That was the time when he got the extension of $10,000?

A. The paper is there that gives the exact date (Exhibit 2). Well, August 13th—August 4th is my recollection of the conversation.

Q. 217. August 4th is the new loan of $10,000?

A. Yes.

Q. 218. And just what did Mr. Swain say at that time, as you remember it now?

A. Well, he gave an idea what he thought the profits would be.

Q. 219. And he didn't think they would come out as well as expected?

A. I think he said that.

Q. 220. And you knew that the corporation had been obliged to borrow—although they had reduced the loan to $10,000 in June. had been obliged to borrow $15,000 more in July and August.

A. I was conversant with the matter of loans as set forth in this sheet, Exhibit 2.

Q. 221. You knew, didn't you, that before they made this new loan in July and August substantially all their European business had been paid for?

A. No, I didn't know it.

Q. 222. Didn't you talk with Mr. Swain about it?

A. I did. Yes, I talked with Mr. Swain about it.

Q. 223. On the subject of when the European tourists were paying; what was said about it?

A. I couldn't tell you.

Q. 224. Do you recall your talk with Mr. Swain at all?

A. Why, more or less.

Q. 225. Now, you said that there was a talk in September
127 between Mr. Collver and Mr. Cumner at which you were present?

A. I don't know what month it was in.

Q. 226. Do you know when it took place with reference to Mr. Collver's return from Europe?

A. It was after he returned from Europe.

Q. 227. Do you know how long after?

A. I do not.

Q. 228. Do you know how long it took place before the bankruptcy of the company?

A. No, sir; don't know.

Q. 229. Is it your recollection, or, so far as you recall, may that conversation have been in November, 1910?

A. I should say it wasn't so late as November.

[No question numbered 230.]

Q. 231. Now, won't you state again what your recollection of that talk is?

A. Which one?

Q. 232. Was there more than one?

A. Well, I said I think this morning that Mr. Collver came in to let us know he had got home from Europe a day or two days after September 22d. I call that the first interview.

Q. 233. Was that a business interview at all?

A. Not at all.

Q. 234. When was the next one with reference to it?

A. I don't know when the next was.

Q. 235. What persons were present?

A. Mr. Swain and Mr. Collver and Mr. Cumner and myself.

Q. 236. What took place?

A. There might have been perhaps "Good morning" passed between us, and the very first thing that was said Mr. Collver stated that he did not need, or did not want, any money, and Mr. Cumner said, rising from his chair, "Well, I don't know as there is anything more to say then."

Q. 237. Is that all you remember.

A. That is all that was said.

Q. 238. Is this a fact; that Mr. Collver came in at this meeting and said that he had not come to borrow money, and didn't wish to discuss business at that time?

A. No, sir; I didn't say anything of the sort.

Q. 239. Are you sure about it?

A. He said what I have testified to and nothing else.

128 Q. 240. You say that Mr. Swain was present at that time?
A. Yes.
Q. 241. And Mr. Collver also?
A. Yes.
Q. 242. You said in answer to Mr. Bailey's question this morning that you concluded they had found money elsewhere?
A. I did in my own mind; yes.
Q. 243. Did you think they needed to find money elsewhere?
A. I thought they needed money to carry on their business.
Q. 244. Did you know that round the world business was beginning in the fall of 1910?
A. I understood it was.
Q. 245. Did you know that they required money to take these tourists about?
A. I knew if the tourists went money would be required.
Q. 246. Did you think they would have to borrow that money from either your bank or some other bank?
A. My thought didn't go as far as that.
Q. 247. But it did go to the point of impelling you to the conclusion when they didn't want your money you thought they must have found money elsewhere?
A. Well, I didn't think necessarily at a bank; I thought perhaps he had sold capital, as he had talked of doing.
Q. 248. Had you heard anything about their selling capital since the summer of 1909?
A. I did not—only my recollection—pardon me, I did. Yes, there was one man that told me he had some of the stock; took it in trade.
Q. 249. When was that?
A. I couldn't say when that was.
Q. 250. Some man took some stock in trade?
A. Stock in trade.
A. 251. Was that Mr. Libbey?
A. Yes.
Q. 252. Did you know Mr. Libbey took that stock in trade before January 1st, 1910?
A. I couldn't say the date it was.
Q. 253. I think you said at the time when this talk took place with Mr. Collver, at which Mr. Collver said something about his not needing, or not wanting, any money, so far as you know there was no note outstanding to the Boylston National Bank?
A. I think there was.
129 Q. 254. What note?
A. $2500 at least must have been outstanding.
Q. 255. Anything except $2500?
A. I couldn't say, because I don't know the date that occurred.
Q. 256. Did you ever tell any person connected with The Collver Tours Company that it was your custom to charge against the deposits a note which was due at the bank?
A. I don't know that I did.
Q. 257. On these occasions when notes of The Collver Tours Com-

pany came due at the bank and they gave checks in payment, did you accept the checks?

A. I don't know. Sometimes checks are brought to the executive counter and sometimes simply passed in to be delivered to whoever has charge of those notes during the day, and he passes the note out when he receives the check.

Q. 258. Did they come to your personal attention or not?

A. I don't know.

Q. 259. Did the bank ever return a check drawn by The Collver Tours Company in payment of a note on the ground that the note had been already paid, or on any other ground?

A. No; I should say not.

Mr. STUDLEY: If I said Mr. Collver's debts, it should be understood I mean The Collver Tours Company and not Mr. Collver personally.

I wish to offer the receiver's inventory and appraisal which I suppose are a part of the record of the court. If not, I wish to formally offer it, and also the receiver's final account showing what he actually realized from the assets. I do this in lieu of calling the receiver himself to testify what he found. I understand it is acceptable to Mr. Bailey.

Mr. BAILEY: Yes.

Mr. STUDLEY: I wish to point out that the receiver's appraisal shows that he found total assets of $2244.30, consisting of cash $1419.30; miscellaneous personal property, $25; two shares of stock Chamber of Commerce, $200; correspondence, mailing lists, trade marks and trade-names used in connection with the business, $570; two large letter files, $30, and his account shows that he con-
130 verted these assets into cash, $2038.04, not converting into cash the two shares of Chamber of Commerce at $200, or rather there was one share of the value of $200.

The COURT: Who was the receiver?

Mr. STUDLEY: Mr. Robert E. Buffum.

The COURT: Of course you understand, Mr. Bailey, if there is anything that you regard as in any way prejudicial you have a perfect right to call the receiver.

Mr. STUDLEY: I also wish to put in the receiver's final report. I would like to read this, if your Honor please.

The COURT: How does that report in any way bear upon the issue we are trying out?

Mr. STUDLEY: Because there has been some discussion of the value of the good-will of the business. He reports the efforts he made to sell it—he was authorized by your Honor or the District judge to sell it.

Mr. BAILEY: It seems to me when we have the appraisal of the receiver, and he calls attention to it, and then the inventory of the trustee and the account of the trustee, that this report of Mr. Buffum, which is a narrative mostly, strikes me as incompetent and immaterial. But I am not very particular, but I had supposed that the figures of the financial condition might have some bearing. I won't make formal objection if your Honor thinks it material.

The COURT: Let it go in as part of the record, but I call your attention to the fact it is only prima facie and may have a very remote bearing on the case.

FRANK P. SWAIN (recalled).

(By Mr. STUDLEY:)

Q. 467. Do you recall, Mr. Swain, a talk with the officers of the bank in September, 1910, shortly after Mr. Collver's return from Europe, or early in October, 1910?

A. Yes, I do.

Q. 468. What were the circumstances of that conversation as you remember them?

A. As I remember them they were very short. I went to
131 the bank with Mr. Collver and there met Mr. Cumner and Mr. Bailey, who had some conversation with Mr. Collver, but as I remember I said little if anything myself.

Q. 469. What did the others say that was said in your hearing?

A. As I remember, Mr. Collver stated that we had not come down for the purpose of borrowing money; I couldn't repeat the very words, but it was to that effect as I remember.

Q. 470. Have you stated all you recall of the conversation, Mr. Swain?

A. That was about all that was said of importance—important enough for me to remember at least.

LEON COLLVER (recalled).

(By Mr. STUDLEY:)

Q. 78. Do you recall a conversation with the officers of the bank in September, or early October, shortly after you returned from Europe in the fall of 1910?

A. I remember the general situation.

Q. 79. Now, did you have a talk with them?

A. Yes, very brief.

Q. 80. Now, what was the substance of that talk, as you recall it?

A. My recollection was that we didn't come for money; we didn't need any money at this time. I think that requires an explanation——

The COURT: Why don't you ask what he went there for?

Q. 81. Why did you go there, Mr. Collver?

A. Because we had received a request to come down for a talk, and when we went down I made the remark we didn't need any money now, and Mr. Cumner made the response, "Well, I don't see that there is anything to say then," and that ended it. The difference between my memory and others is the word "now"—that question whether we did "now" or did some time is the point we don't quite remember the same.

Q. 82. Did you go there to borrow money that day?

A. No, we did not.

Mr. STUDLEY: I rest.

132 *Evidence for the Respondent.*

Mr. BAILEY: I am a little embarrassed whether I ought to call any witness, but I want to give your Honor all the evidence there is, and will ask Mr. Cumner, who is here, to be sworn.

HARRY W. CUMNER (sworn).

(By Mr. BAILEY:)

Q. 1. Now, Mr. Cumner, your full name?
A. Harry W. Cumner.
Q. 2. What is your connection with the Boylston National Bank?
A. President.
Q. 3. And how long have you held that office?
A. Between five and six years.
Q. 4. And now whether or not you knew The Collver Tours Company had an account with your bank?
A. Yes.
Q. 5. Do you remember about when they began, whether in 1907 or not? Perhaps I can refresh your memory. Look at these deposit cards which I have here. Does that help you to tell when their deposit account began?
A. Well, this is August 24, 1906.
Q. 6. So it began as early as that time?
A. Before that, some time.
Q. 7. And from that time on the general deposit account continued, did it, until December, 1910?
A. Yes—just a moment; it might have been a little before that—I don't know how far.
Q. 8. And so that general deposit account which began as early as 1906, and perhaps a little earlier, continued, did it, until early in December, 1910?
A. Yes, sir.
Q. 9. Now, about this matter of loans, who had the duty of attending to negotiating matters of loans and discounts?
A. At the time these loans were made I had that duty.
Q. 10. When did you first have any talk with Mr. Collver, if it was with Mr. Collver, about lending any money to his company?
A. The first conversation was with Mr. Collver personally in the spring or early summer—in the spring of 1907.

133 Q. 11. And what in substance was the conversation?
A. I arranged at that time to make him a loan of $4000 for the purpose of carrying on his business of tours, which he was to pay in the fall of that year. 1907.
Q. 12. What, if anything, did he say about what it was wanted for, or about his business?
A. He wanted it for the general conduct of his business he was building up—he was starting in the tourist business—he had previously been employed by others—and he was advertising pretty freely I think at that time; also he spoke something of his letter of credit, but it was in the general prosecution of his business.
Q. 13. And these notes were taken care of in the fall?

A. As they matured in October.

Q. 14. Now, in 1908 did you make any further loans?

A. Yes, sir; on February 24th I loaned The Collver Fours Company $6500.

Q. 15. And what talk, if any, did you have with him as to what that would be wanted for, and when it would be paid?

A. The arrangement as to payment was the same as the previous year—it was to be paid in the fall, and he reported to me at that time his business was growing, that it was successful, that he was increasing his clientage and he wanted it in the general conduct of his business for that year.

Q. 16. The total amount loaned that year was how much?

A. $6500.

Q. 17. Paid in the autumn?

A. Paid in September and October in regular course.

Q. 18. Coming to 1909, in the spring, did you have any talk with Mr. Collver about loans that year?

A. Yes, sir.

Q. 19. What was that talk, and what, if anything, was fixed as his line of discount?

A. In the spring of 1909 I arranged with Mr. Collver to give him a line of discount up to $25,000, and that was based upon the business which he was doing—which he expected to do and was doing in round the world business, and also he was even then looking forward to his 1910 Ober-Ammergau business. We discussed also the increase of business,—the whole business was apparently
134 a growing one and growing pretty rapidly at that time.

Q. 20. Before he went away to Europe the 2d of April, 1910, did he have any talk with you about the loan of the bank to his company?

A. Yes, he came in the spring; I should think it was early in March, but it was in the spring previous to that, and went over in some detail his Ober-Ammergau business and told me the number of beds which he had secured at Ober-Ammergau and the number of steamship reservations he had made and the necessary payments —the amounts he had to pay on these reservations, and his report, as I recall it—as a result of that interview with him we felt——

Q. 21. Never mind what you felt—although I don't know——

The COURT: As a result of that interview what did you do?

Q. 22. What did you say to him, if anything, you would do in the matter of continuing the loans?

A. We went right on with the loans.

Q. 23. Did you tell him you would?

A. Yes.

Q. 24. What, if anything, was said by him as to his expectations of meeting these loans? What did he say, if anything, he expected they would do about meeting those loans that fall?

A. He said they would be paid in the fall; that was the arrangement I had previously made with him, that they should be liquidated that fall,—fall of 1910.

Q. 25. Was there anything said about their being reduced to $10,000 by July 1st?

A. Not to my recollection.

Q. 26. After that interview was his line of discount—the line of discount of his company ever cancelled or curtailed until November?

A. The line of discount went right along at $25,000 until the latter part of November.

Q. 27. 1910?

A. Yes, sir.

Q. 28. Now, I will ask you whether you knew about the letter of credit business? You knew about that in a general way?

A. Yes, sir.

Q. 29. And you knew there was a separate account for that?

A. Yes.

135 Q. 30. And this letter of December 16, 1909, of Mr. Swain, Exhibit 11, did you see that letter about the time it came?

A. Yes, sir.

Q. 31. And did you see this agreement which was signed by The Collver Tours Company?

A. The letter of credit agreement? Yes, sir.

Q. 32. Who prepared that?

A. Mr. Roberts.

Q. 33. Your counsel?

A. Yes, sir.

Q. 34. Now, I will ask you whether you had any conversation at any time with Mr. Collver or Mr. Swain to the effect that the general deposit account should be anything else than a regular general deposit account subject to check in ordinary course?

A. I did not.

Q. 35. Did you have any understanding with them in any way that that account was to be anything other than a regular deposit account subject to their checks?

A. No, sir; I did not.

Q. 36. Now, I will ask you about Mr. H. B. Bailey's function and authority in the matter of the renewal of notes when they came due, these notes and other notes?

A. The method of handling renewals in the bank is this: There is a line of credit established with an account, as $25,000 was established in this account, and each week a list of renewals—each Wednesday a list of renewals for the following week is prepared; all the notes that are maturing practically are put on that list.

Q. 37. Of all your customers?

A. Yes, of all the customers,—the amount of their loan, the amount of the note coming due, the amount of their balance is shown on this sheet, and this sheet is brought to me and I in turn take enough copies of that sheet into the directors' room and this is laid on the table, each director having one, and they are subject to the inspection of the directors. If there is any objection to any account, or any discussion of that account, it is gone over with, and

any vote is recorded on the sheet, and these sheets are handed back to the executive officers with the instructions on them. If there is no comment, the old account is subject to renewal if requested.

Q. 38. So far as you know, was there any instructions
136 given to Mr. H. B. Bailey, or anyone else, not to renew these notes of The Collver Tours Company up to $25,000 if requested, previous to November?

A. There was absolutely nothing of that kind in my recollection at all up to the time—the last of November—I mean previous to that date.

Q. 39. Did you know in a general way anything about the amounts of the deposits of The Collver Tours Company?

A. Yes, sir.

Q. 40. What did you know about that during the year 1910?

A. Commencing January, 1st, 1910, we installed a system of average balances, entering these balances on weekly cards, and these weekly cards in turn transferred to a monthly card, so that these were available at all times during 1910 for our inspection.

Q. 41. Whether or not it was part of your function to examine these cards?

A. In looking over this weekly renewal sheet we always took the bank's balance, and, to go further than that, we looked to see the average balance, also shown on the sheet.

Q. 42. Now, how does that happen, the 3d of October, where there was a $5000 note paid and a new note of $2500 discounted? What, if anything, did you know about that?

A. Well, that note was $5000 on the 3d of October, and there was nothing unusual or extraordinary that came to my attention.

Q. 43. Did you have any talk with Mr. Swain about it?

A. Not to my knowledge.

Q. 44. Or Mr. Collver?

A. No, sir; I have no recollection of anything.

Q. 45. Were there special instructions given to Mr. Bailey about that?

A. No, sir; went in regular course.

Q. 46. Now, we have had some testimony about a conversation after Mr. Collver got back September 22d, in either September or October. Do you recall such conversation?

A. Yes, sir; very well.

Q. 47. When do you think it was?

A. It was some time right around the 14th of October; just before or just after the 14th of October.

Q. 48. What was the conversation; who was present?

A. I asked that Mr. Collver be requested to come up to
137 the bank as I wanted to have a conversation with him in regard to his account—his new loans for the coming season, and the time was set and Mr. Collver came down with Mr. Swain and they came into the bank, and I asked Mr. Bailey to come in so he might hear the conversation; if there was any new arrangement going to be made about the loans or anything, I thought he should be there to hear it and know about it and I wouldn't have to

go over it with him afterwards. I said to Mr. Collver that I would like to have him give me a statement of the condition of the company as it then existed, so that I might see what had been the result of his summer's business—the Ober-Ammergau business, and that I would like to go over it carefully with him and see what arrangements I wanted to make in regard to the new loans, and he said to me, "We don't need any money". We have had a little discussion about that word "now". I said, "Why then I don't see as there is anything more to be said". His saying he didn't need any money gave me the impression they had perhaps——

[Mr. Studley objects.]

Q. 49. Now, some time in November there was a further discussion about new loans. Tell us about that, whether you had interviews with Mr. Collver or Mr. Swain, and what information you had which led you to do what you did do?

A. I don't recall the interview that Mr. Swain referred to in his testimony, but I do the interview with Mr. Collver.

Q. 50. That was at your other office?

A. Yes, at my business office after banking hours, about five o'clock, or might be later. Mr. Collver came in, and for a few days previous to that we had been hearing that the Collver people hadn't had a successful time, and I went over the matter with Mr. Collver, and I told him then that we couldn't renew the loans, we couldn't go on—not renewing the loans, but we couldn't make him new loans the next year,—no question of renewing them.

Q. 51. Did you tell him at that interview that you had said to your directors some time previous to that when they made objections to continuing the loans that if they would leave it to you
138 you would get them out of it; remember telling him that?

A. No; I never said anything about getting them out. I may have said to my board of directors that I would look after that account. We frequently take on particular accounts, or an account, to look after.

Q. 52. Now, Mr. Cumner, at the time these notes were paid in the fall of 1910, either by check or off-set in the account, did you understand or believe that anything was being done which would effect a preference?

[Mr. Studley objects and excepts.]

A. I had no such knowledge.

Q. 53. Or any such thought?

A. I had absolutely no knowledge of anything of the kind.

Q. 54. I ask if you had any reason to believe anything of the kind?

A. Absolutely no.

Cross-examination.

(By Mr. STUDLEY:)

X Q. 55. Did you tell Mr. Collver at that interview in November, 1910, that your directors had criticized you severely for making as large loans to Mr. Collver as you had made him?

A. I may have said they criticized me, for I was letting Mr. Collver down as easy as I could. I made up my mind I couldn't make him further loans, and I was letting him down as easy as I could.

X Q. 56. Meaning by that your directors had not criticized you?

A. Not severely.

X Q. 57. Had they criticized you at all?

A. No; the account was talked over by the board, but no criticism.

X Q. 58. How early in 1910 was the account talked over by the board?

A. I don't recall, but it was in the fall on some of the maturity of these later notes.

X Q. 59. And did you then say to the directors that you would look after this, in substance?

A. It was one of the accounts I was looking after. I said, "Yes, that account is all right; I will take care of it." At that same time I told the board of directors the arrangement I had; it was
139 to be paid out in the fall of 1910, and it was paid out you know.

X Q. 60. I am not doubting you did take care of that. As I understood your testimony in answer to Mr. Bailey's question, your arrangement with Mr. Collver to continue his line of $25,000 credit was made in the spring of 1910; probably in March?

A. Early in the spring I had the talk with him.

X Q. 61. And you said that line of credit continued right along there until November at $25,000?

A. Line of credit for notes.

X Q. 62. Not actual discount?

A. No; line of credit was $25,000.

X Q. 63. Was any different arrangement made after that in regard to his line of discount?

A. Not to my recollection.

X Q. 64. Will you kindly look at the sheet Exhibit 2? Wasn't his line of credit $30,000?

A. There was one special loan; I overlooked that $5000; that didn't affect his line of discount.

X Q. 65. Didn't increase it?

A. No; we loaned him a special $5000 in addition to his $25,000.

X Q. 66. Was he entitled to get his $25,000 at any time during the summer of 1910?

A. In my judgment, he was.

X Q. 67. I mean under that arrangement. Do you recall that some time in August an application was made for a further loan?

A. Yes; I can't fix the time.

X Q. 68. Which was refused?

A. Yes, sir.

X Q. 69. You do recall that application for a further loan in August, 1910, in the summer, some time?

A. Yes.

X Q. 70. That was turned down by you, wasn't it?

A. Yes; it was outside his line.

X Q. 71. Wasn't by vote of your board of directors?

A. No; I turned that right down then and there. He asked for that outside his limit, and I felt he had enough at that season to go along and didn't need it.

X Q. 72. It was in August?

A. Mr. Swain has testified it was in August.—I don't know. It was in the middle of the summer; might be late in July or August; I haven't anything to fix it by because we did nothing, you know.

140 X Q. 73. You said a few moments ago that you recalled no conversation with Mr. Collver or Mr. Swain to the effect that their deposit account with you should be different from the ordinary deposit account?

A. The question was of the general deposit account; I don't recall anything.

X Q. 74. Was there any talk between you and Mr. Swain or Mr. Collver in regard to the nature of their deposit account at all?

A. It came as a regular deposit in 1906, and went right on the same way.

X Q. 75. Never any talk between you and Mr. Collver about it?

A. In regard to balance?

X Q. 76. Yes.

A. Why, I presume when I first talked with him; no doubt when I talked with him I stated he should have a balance of a certain percentage of the loans.

X Q. 77. His loans didn't run above $4000 that year?

A. No.

X Q. 78. I understand the arrangement was made in June, 1907, that notes should be paid when due; that is what the arrangement was?

A. The arrangement was they should be closed out that fall.

X Q. 79. Was that quite accurate, Mr. Cumner? I call to your attention that notes given June 14, 1907, were paid upon their due dates without renewal?

A. Yes; but if he had wanted another renewal, either in full or nearly so, we should probably have given it. As it happened, they paid them.

X Q. 80. Paid when due?

A. Yes.

X Q. 81. And that is all that happened?

A. To the best of my knowledge.

X Q. 82. And the same thing in 1908?

A. Yes.

X Q. 83. Took three notes in February and paid them on due dates?

A. Apparently so; yes.

X Q. 84. Now, wasn't the same arrangement made in the spring of 1909 that these notes should be paid when due?

A. The arrangement was they should be paid at the end of the season, not necessarily when due.

X Q. 85. Should be paid at the end of the season?

A. Yes.

141 X Q. 86. The notes of 1909 were to be paid at the end of the season?

A. Yes.

X Q. 87. Was that stated in conversation between you and Mr. Collver?

A. Yes, sir.

X Q. 88. What did Mr. Collver say was the reason the notes in 1909 were not paid when due or at the end of the season?

A. At that time we had that letter of credit arrangement and we opened a letter of credit account with him which, it is my recollection, involved a deposit of $15,000 into a special account and he was also carrying about an equal amount in his deposit account, and for that reason we arranged to have them go over into 1910, and we regarded 1909 and 1910 as really one period on account of the large amount of advertising expense they were going to on account of preparing for this Passion Play business.

[No cross-question numbered 89.]

X Q. 90. Then the arrangement made in the spring of 1909 was changed in some form?

A. Was modified.

X Q. 91. To the extent these notes were not paid?

A. That is right.

X Q. 92. Instead of being paid they ran over at the rate of $25,000 into the year 1910?

A. Yes.

X Q. 93. And between September, 1909, and May, 1910, The Collver Tours Company didn't pay any of their notes, did they?

A. There was a $5000 note paid in July.

X Q. 94. What year?

A. 1909, the 12th, and one of $5000 paid the 19th.

X Q. 95. Was that paid the 19th?

A. Yes, and then the next note, as you see by the exhibit (2), is May 12, 1910.

X Q. 96. The Ober-Ammergau business was to be in the spring and summer of 1910?

A. Yes.

X Q. 97. And you knew that the tourists paid in advance, didn't you?

A. I knew they paid money in advance—don't know whether they paid fully in advance.

X Q. 98. Hadn't that been the subject of conversation between you and Mr. Collver?

A. Yes, I guess we talked that over; though I didn't know if they paid in full in advance always.

142 X Q. 99. That is the general practice?

A. That is the practice I know, of course.

X Q. 100. You knew these tourists, Ober-Ammergau tourists, were most of them out of the United States and on their way to Europe as early as the first of July, didn't you?

A. I think the Knights of Columbus went even later than that.
X Q. 101. Apart from the Knights of Columbus?
A. They were largely going in the summer, of course.
X Q. 102. In the early summer?
A. Yes.
X Q. 103. Now, when it appeared that the moneys these tourists had paid, together with the sums that The Collver Tours Company had borrowed from you, were insufficient to keep these tourists about in Europe, didn't you know that that European business had been a failure?
A. I didn't arrive at that conclusion.
X Q. 104. If you had adverted to the facts before you, namely, that the tourists had paid in advance, in whole or for the most part, and that as early as July 7th, 1910, it was necessary for The Collver Tours Company to borrow additional funds from you to get these tourists about in Europe, wouldn't you have known that the business had not been profitable?
A. Every year their summer business—there was nothing unusual in the fact that their balance ran down in the middle of the summer, in July and August. I think if you refer to that exhibit you will find they always did so; that is my recollection.
X Q. 105. Regular course of business for them to borrow money to complete their tours in July and August?
A. They didn't borrow money specifically for that purpose,—borrowed it as a going business.
X Q. 106. In 1907 did they borrow any money in the summer?
A. They borrowed what they needed, that $4000 which was loaned.
X Q. 107. What was the date?
A. 14th of June.
X Q. 108. In 1908 did they borrow any money in the summer?
A. No.
X Q. 109. In 1909 borrow any money in the summer?
A. We renewed a note for them the twelfth day of July and we renewed a note the thirteenth day of August—these were
143 for $5000—and we renewed another note the thirteenth day of September for them, of $10,000.
X Q. 110. I will turn to another subject. Did you see this statement or memorandum which we call Exhibit 4?
A. Yes, sir.
X Q. 111. At about that time it was left with the bank?
A. I saw it the day it was left there.
X Q. 112. Did you see the statement filed at the State House, Exhibit 1, or a copy of that statement?
A. No, I didn't see that.
X Q. 113. Did you see the abstract from the "Banker and Tradesman"?
A. No, I didn't see that.
X Q. 114. Is it customary to compare statements filed at the State House with the statements on file at the bank?
A. It is at this time, but it wasn't very well organized in 1909.

The first of January, 1910, we systematized that matter. That perhaps accounts for the confused evidence on that point.

X Q. 115. Since 1910 it has been established?

A. Yes, since January 1st, 1910.

X Q. 116. I don't want to mislead you; this time of which I am speaking is the spring of 1910. You say the system was established in January, 1910; are you correct?

A. Yes, I am correct, but I didn't see—didn't happen to see that statement; that is taken by the vice-president and turned over to the credit department and filed with the credit papers—gone over by me, but this particular one I didn't have. I saw this Exhibit 4.

X Q. 117. You saw that (Exhibit 4)?

A. Yes.

X Q. 118. And you saw the item of loss that appears there?

A. Yes.

X Q. 119. Did you ask for any explanation of what the item "Foreign Offices" meant?

A. I had absolutely no conversation with anyone in regard to that—with any officer of The Collver Tours Company, is what I mean.

X Q. 120. Now, you say in November you heard rumors that the summer business of The Collver Tours Company had not been a success?

A. Yes.

X Q. 121. Did you hear these rumors before Mr. Swain ap-
144 plied for a loan in 1910?

A. I don't recall Mr. Swain applying, so I can't answer that; I so testified.

X Q. 122. How long before Mr. Collver applied did you hear these rumors?

A. Oh, within a few days, or within a week perhaps.

X Q. 123. From whom did you hear these rumors?

A. The principal information I got was from a gentleman whom I think was Mr. Towle of the Bureau of the University of Chicago.

X Q. 124. How did you happen to get the information?

A. He came to my office; called to see me.

X Q. 125. Called with reference to The Collver Tours Company?

A. He came to ask some questions I think.

X Q. 126. Was that before you knew that The Collver Tours Company had applied to your bank for more money?

A. My impression is that it was.

X Q. 127. Prior to his coming had you heard anything about The Collver Tours Company?

A. I hadn't heard anything.

X Q. 128. From any source?

A. I don't recall hearing anything.

X Q. 129. Did you have any other memorandum from The Collver Tours Company about its financial condition other than that statement, Exhibit 4?

A. This is the only one I have any recollection of.

X Q. 130. Did you ask for any explanation of that item of loss of $44,896 of any officer of The Collver Tours Company?

A. I just testified I had no talk about this.

X Q. 131. I understand that, but I wanted to know if at any time you called that matter to their atention in any way?

A. No, sir.

X Q. 132. How frequently do your directors meet?

A. Weekly.

Mr. BAILEY: We rest, your Honor.

Mr. BAILEY: Now, whether your Honor will hear arguments at this time?

The COURT: You desire to argue it early? I suggest you might go over it early and I think it would be very helpful to me if you could make up a little brief on the facts—I don't mean an extensive brief, but setting forth what you contend the evidence shows, and then cite any authorities you may desire to give me. I hope counsel will bear in mind the two decisions of Denham against the Boylston Bank and the Massey case. The burden of course is on you, Mr. Studley, to satisfy myself this is not a case of set-off. I think the Supreme Court decision says there may be instances where it can be shown as a preference.

[Adjourned sine die.]

Exhibits.

EXHIBIT 1.

[Put in Evidence, Page 56.]

Proper First Name Should be Written in Full. Initials and Abbreviations are not Sufficient.

[Acts of 1903, Chap. 437.]

SECTION 45. Every corporation shall annually, within thirty days after the date fixed in its by-laws for its annual meeting last preceding the date of such report, or within thirty days after the final adjournment of such meeting, but not more than three months after the date so fixed for said meeting, prepare a report of condition which shall be signed and sworn to by its president, treasurer and at least a majority of its directors.

It is expected that this blank can be readily filled from the report of affairs made to the stockholders at their annual meeting.

Corporations with a capital of $100,000 or more must appoint an auditor to certify the certificate. (See chapter 437, section 47.) The fee for filing this certificate is $5.00, and should accompany the certificate. Checks should be made payable to the order of the Secretary of the Commonwealth.]

We, Leon Collver President, and Treasurer, and Ethel Blanchard Collver and I. R. Collver being a majority of the directors of the Collver Tours Company in compliance with the provisions of chap-

ter 437 of the Acts of 1903, and all acts in amendment thereof and in addition thereto, do hereby certify

1. That the name of said corporation is The Collver Tours Company

2. That the location of its principal office in this Commonwealth is No. 420 Boylston Street [city or town], Boston and outside this Commonwealth, No. 34 Water Street [city or town], Yokohama Japan

3. That the date of the last annual meeting was January 3, 1910

147 4. That the total amount of its authorized capital stock is 100,000.

That said capital stock is divided into 1,000 shares, of which 750 shares are preferred and 250 shares common, and the par value of each share of said stock is preferred 100 dollars, common 100 dollars.

The amount issued and outstanding at said date was $41,100. 161 shares preferred 250 shares common.

The total amount then paid thereon was preferred $16,100 dollars, common $25,000 dollars.

5. That the assets and liabilities of the corporation, at the date of the end of its last fiscal year, were as follows—Dec. 31, 1909.

[Insert here date of end of fiscal year, which by section 20 should be not more than ninety days prior to the date fixed in the by-laws for the annual meeting.]

Assets.

Office Fixtures	$1,850 00
Foreign Offices	4,500 00
Merchandise including:	
Manufactures, merchandise, material and stock in process	.....
Cash and debts receivable	32,090 87
Patent rights	.....
Trade-marks	.....
Good will	34,700 00
Profit and loss	44,896 65
Total	$118,037 52

Liabilities.

Capital stock	$41,100 00
Accounts payable	76,937 52
Funded indebtedness	.....
Floating indebtedness	.....
Surplus	.....
Profit and loss	.....
Total	$118,037 52

148 6. That the names and addresses of all the directors and officers of the corporation and the dates at which the term of office of each expires are as follows:—

Name of office.	Names.	Addresses.	Expiration of term of office.
President..	Leon Collver.....	Brookline, Mass...	Jan. 2, 1911.
Treasurer..	"		
Clerk.....	F. P. Swain.....	Salem, Mass.....	"
Directors:			
	Leon Collver.....	Brookline, Mass....	"
	I. R. Collver.....	" "	"
	H. R. Collver.....	" "	"
	E. B. Collver.....	" "	"

The committee selected at the annual meeting of this corporation, which has an outstanding capital stock of $100,000 or more, at a meeting held at — on the — day of —, A. D. 191–, has employed —— ——, of — as Auditor, pursuant to the provisions of section 47 of chapter 437 of the Acts of 1903, and of chapter 326, Acts of 1909.

President, Treasurer and majority of Directors should sign in space below.

In Witness Whereof, we have hereunto signed our names, this twenty fourth day of March in the year nineteen hundred and ten.

ETHEL B. COLLVER.
LEON COLLVER.
I. R. COLLVER.

THE COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

MARCH 24, 1910.

Then personally appeared the above-named Leon Collver Ethel B. Collver I. R. Collver and severally made oath that the foregoing certificate, by them subscribed, is true to the best of their knowledge and belief.

Before me,
[L. S.]

FRANK P. SWAIN,
Notary Public.

[If out of Massachusetts, oath may be taken before a commissioner for Massachusetts, or Notary Public; if within Massachusetts, before a Notary Public or Justice of the Peace.]

49 *Auditor's Certificate.*

(This certificate is to be used only by corporations having a paid-in capital of $100,000, or over.) This auditor may not be a bookkeeper, treasurer or other officer of this corporation, who has signed and executed this statement. Chap. 300 of the Acts of 1908.

—— —, 191–.

I, —— ——, of —, the duly selected Auditor of — a corporation duly established by law, hereby certify that I have completed the

examination of the books of said corporation, and its certificate of condition as executed by its officers, to which this certificate is attached, and that said certificate represents the true condition of the affairs of said corporation as disclosed by its books. This certificate is made by me in compilance with the provisions of section 47, chapter 437 of the Acts of 1903.

—— ——, *Auditor.*

THE COMMONWEALTH OF MASSACHUSETTS,

——, *ss:*

—— —, 191–.

Then personally appeared the above-named and made oath that the above certificate by him subscribed is true.

Before me,

—— ——,
Justice of the Peace.

[Write Nothing Below.]

Collver Tours Co.
Fee $5.00 paid.

Certificate of Condition.

[Acts of 1903, Chap. 437, Sect. 45.]

Filed in the Office of the Secretary of the Commonwealth, Mar- 31, 1910.

I hereby approve the within certificate, this 31st day of March A. D. nineteen hundred and ten.

WILLIAM D. T. TREFRY,
Commissioner of Corporations.

Commissioner of Corporations. Mar- 29, 1910.
150 Commissioner of Corporations. Mar- 25, 1910.
Received Mar- 31, 1910, Corporation Division, Secretary's Office.
Commissioner of Corporations. Mar- 31, 1910.

THE COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE SECRETARY,
BOSTON, *Dec.* 20, 1911.

A true copy.
Witness the Great Seal of the Commonwealth.
[SEAL.]

ALBERT P. LANGTRY,
Secretary of the Commonwealth.
W. C. B.

Exhibit 2.

[Put in Evidence, Page 59.]

Collver Tours.

				New.	Renewed.	Days.	Paid.	Balance.
June	14,	1907	$4,000	$2,000	....	119	....	$4,000
				2,000	....	133	....	....
Oct.	1,	"	....	....	....	...	2,000	2,000
"	15,	"	....	....	....	...	2,000	0
Feb.	24,	1908	6,500	2,000	....	204	....	6,500
				2,000	....	220	....	....
				2,500	....	234	....	....
Sept.	15,	"	....	....	....	...	2,000	4,500
Oct.	1,	"	....	....	....	...	2,000	2,500
"	15,	"	....	....	....	...	2,500	0
Apr.	13,	1909	15,000	5,000	....	122	....	....
				10,000	....	153	....	15,000
May	12,	"	10,000	....	....	61	....	25,000
*July	12,	"	....	....	5,000	demand	5,000	20,000
"	19,	"	10,000	....	....	123	5,000	25,000
Aug.	13,	"	....	....	5,000	122	....	25,000
Sept.	3,	"	500	....	....	60	....	25,500
"	13,	"	....	....	10,000	154	....	25,500
Nov.	2,	"	....	....	....	...	500	25,000
"	18,	"	....	....	10,000	119	....	25,000
Dec.	14,	"	....	....	5,000	151	....	25,000
Feb.	14,	1910	....	....	10,000	182	....	25,000
Mar.	18,	"	....	....	10,000	94	....	25,000
Apr.	13,	"	5,000	....	....	30	....	30,000
151								
May	12,	1910	....	....	....	...	5,000	25,000
"	13,	"	....	....	....	...	5,000	25,000
June	20,	"	....	....	....	...	10,000	10,000
July	7,	"	5,000	....	....	15	....	15,000
"	14,	"	5,000	....	....	60	....	20,000
"	22,	"	....	....	....	...	5,000	15,000
Aug.	4,	"	5,000	....	....	33	....	20,000
"	4,	"	5,000	....	....	60	....	25,000
"	16,	"	....	....	5,000	46	....	25,000
"	16,	"	....	....	5,000	60	....	25,000
Sept.	6,	"	....	....	5,000	15	....	25,000
"	12,	"	....	....	....	...	5,000	20,000
"	21,	"	....	....	....	...	5,000	15,000
"	30,	"	....	....	....	...	5,000	10,000
Oct.	3,	"	....	....	2,500	91	....	10,000
Oct.	3,	"	....	....	....	...	2,500	7,500
"	14,	"	....	....	....	...	5,000	2,500

*Coll—$5,000 Bonds N. Y. Central Lines.

EXHIBIT 3.

[Put in Evidence, Page 62.]

A.

Capital Stock	.....	100,000.00
Goodwill	34,700.00	
Treasury Stock	58,900.00	
Foreign Offices	4,465.13	
Office Fixtures	1,889.93	
L. S. Collver personal	.....	200.00
Notes Payable	.....	25,000.00
Dep. to S. S. Co	19,166.67	
Dep. a/c Tours	.....	20,543.40
Mis. Acc'ts Pay	.....	1,591.50
Mis. Acc'ts Rec	447.59	
Letter Credit a/c	1,463.65	
Uncompleted contracts	.....	9,812.50
Outstanding L/C	.....	7,651.87
Cash	2,497.59	
	123,530.56	164,799.27
152 Deficit Dec. '09	44,896.65	
	168,427.21	

COLLVER,
Ap'l, 1910.

EXHIBIT 4.

[Put in Evidence, Page 63.]

Capital Stock	.....	100,000.00
Goodwill	34,700.00	
Treasury Stock	58,900.00	
Foreign Offices	4,465.13	
Office Fixtures	1,889.93	
L. S. Collver personal	.....	200.00
Notes payable	.....	25,000.00
Dep. to S. S. Co	19,166.67	
Dep. a/c Tours	.....	20,543.40
Misc. Acc'ts Pay	.....	1,591.50
Misc. Acc'ts Rec	447.59	
Letter Credit a/c	1,463.65	
Uncompleted contracts	.....	9,812.50
Outstanding L/C	.....	7,651.87
Cash	2,497.59	
	123,530.56	164,799.27
Deficit Dec. '09	44,896.65	
	168,427.21	

COLLVER,
Ap'l, 1910.

153

EXHIBIT 5.

[Put in Evidence, page 71.]

$5000 00/100 285/12 BOSTON, MASS., *Aug.* 4, 1910.
Due Oct. 3.

Sixty days after date we promise to pay to the order of Boylston National Bank Five thousand 00/100 Dollars
Value received payable at said Bank
No. —. Due —. Charge Acc't ——.
Paid and Cancelled

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *President.*
420 Boylston.

[Endorsed on back:] The Collver Tours Company, by Leon Collver. Leon Collver.

EXHIBIT 6.

[Put in Evidence, page 71.]

$5000 00/100 285/11 BOSTON, MASS., *Aug.* 4, 1910.
Due Sept. 6

Thirty days after date we promise to pay to the order of Boylston National Bank Five thousand 00/100 Dollars
Value received payable at said Bank
No. —. Due —.
Paid and Cancelled —.

THE COLLVER TOURS COMPANY,
By LEON COLLVER, *President.*
420 Boylston.

[Endorsed on back:] The Collver Tours Company, by Leon Collver, President. Leon Collver.

154

EXHIBIT 7.

[Put in Evidence, page 82.]

An Unusual Seven Per Cent Opportunity.

You have personally known something of the Collver Tours in the past, and as an old friend you may be interested in the enclosed reprint of an article which appeared recently. It was written by an "outsider," but is really a nut-shell history down to date of what the Collver Tours Company has actually accomplished.

A few definite points are brought out or touched on which are worthy of attention:

1st. The logical evolution of the Collver Company as a new force in the field.

2nd. The Collver Tours were founded on a characteristically distinctive Idea, which has been rigidly adhered to.

3rd. The Collver Idea has "made good" with the Public.

4th. The growth has been sure and steady.

5th. Remarkable success has been attained by recognizing just what new moves were called for by existing circumstances from time to time. Not a false step has been made, not a "plunge" has been taken; but every new feature announced has been conservative and sane, and by its success has been in its turn a stepping stone for the next.

6th. In the beginning, depending largely on the experience and sagacity of one man, Mr. Leon Collver, the Collver Tours Company has steadily expanded into a great organization with at least six members of its official staff any one of whom is qualified to run the Company's business in any possible emergency, over seventy agents in the United States, branch offices and agents all around the world, and carrying by far the largest number of people round the world of any tour company.

7th. Not only has the Collver Tours Company almost a monopoly in high-priced organized travel, but it has successfully established moderate and low-priced tours of distinction which are attracting people who demand less of luxury than the Collver Tours have always furnished, though they are appealed to by our distinctive methods, and who have heretofore been forced to patronize other tour companies. This under the name of "The Boston Travel Society Journeys."

So much for the past.

Today the Collver Tours Company finds itself in a practically impregnable position as regards organized travel on the highest plane and rapidly supplying the needs of travelers of more moderate means, and doing this a little better than it is done anywhere else.

Today it is a strongly fortified organization. Its established business principles and methods, its prestige, its sol-d foundation, its wide reputation, its constant and continually growing business (which is cumulative and "compounds" itself from season to season)—all these are assets of a very real and tangible sort.

All this has taken money, much money, as well as time and brains and careful concentration to build up.

The Collver Tours Company has been exceedingly profitable, practically from the start, but instead of the profits being withdrawn, they have gone into building up the business.

A large organization costs money, advertising costs money, but it not only builds business, but is the very best business insurance.

The Collver Tours Company is well advertised; advertisements of Collver Tours and of Boston Travel Society Journeys are appearing constantly in magazines and weeklies all over the country which have proven their paying value.

And next year is the Oberammergau Passion Play. Once every ten years the traveling public sits up and takes notice, as at no other time. "Europe in 1910" is already the aim of thousands and thousands of Americans. Mr. Collver was at Oberammergau in

1900, and knows what to do and how to do it. There is no question of the When. Now is the time.

Already the Collver Tours Company has actually reserved twelve hundred and fifty seats (and beds) at Oberammergau for the Passion Play and a like number of Trans-Atlantic passages are being arranged for. Plans are maturing which already foretell
156 that this number will not be nearly enough to accommodate the patrons of the Collver and Boston Travel Society parties. But deposits must be made on these reservations as a guarantee of good faith (the deposits are later refunded in full as a part of the passage money), and nothing is salable unless brought to the attention of the public.

Hence it is that the Collver Tours Company has decided to offer at par $50,000 of its preferred stock for subscription (only $14,000 is at present out-standing), and believing that their friends should have first chance, this announcement is being sent at this time only to past patrons and personal acquaintances of the Collver Tours Company. Whatever is left, if any, will afterward be more generally offered.

The preferred stock (full paid and non-assessable, $100 shares) is 6% cumulative, and an extra 1% has been added, making a gilt-edge 7% cumulative investment. Interest dates May 15 and November 15. If at any time after two years from date of purchase the subscriber may wish to withdraw from his investment, he may, at his option, return the stock to the treasury (on giving sixty days' notice) and receive in return the full value that he paid for the same in cash, together with any and all accrued dividends. It is made a condition of the purchase of these shares that should the holder wish at any time to dispose of his allotment, as a whole or in part, they shall be first offered for sale to the Treasury of the Company. Failure to comply with this provision will cancel the specially added 1%.

Please Note:

The stability of the proposition.

The returns are larger than from most conservative investments.

The option of turning the stock into cash at its full value at any time after two years.

The record of the Company and the men behind it.

Any questions which are not covered by the plain statement of facts above will be cheerfully answered.

The above offering is made subject to previous sale.

57 Remittances (New York or Boston exchange preferred) should be made payable to The Collver Tours Company.

THE COLLVER TOURS COMPANY,
420 *Boylston Street, Boston.*

June 8, 1909.

References:
Boylston National Bank of Boston.
R. G. Dun & Co., and Bradstreets.

EXHIBIT 8.

[Put in Evidence, page 82.]

The Collver Tours Company, 420 Boylston Street.

BOSTON, *Oct.* 12, 1909.

Boylston Nat'l Bank, Boston.

DEAR SIRS: Referring to the note I endorsed as a favor to Mr. Libby, I wish to explain that our account with him was paid up to date (barring a petty balance of twenty-nine dollars, which I offered and he refused as too trifling to consider at the time)—so that my endorsement was given solely in a spirit of friendliness; not of convenience to me.

In a business way I justified the endorsement to myself by the probability that by the time the note was due our account with Mr. Libby might easily be within reasonable reach of the amount—as he has several orders in process now.

I will take this occasion to notify you that the company and myself personally have now no outstanding obligations other than our discounts with you—the Boylston N'l Bank; also that our business is now coming along splendidly.

Yours faithfully,

LEON COLLVER.

158 EXHIBIT 9.

[Put in Evidence, page 85.]

The Collver Tours Company, 420 Boylston Street.

BOSTON, *Nov.* 24, 1909.

Mr. H. B. Bailey, Boylston N'l Bank.

DEAR MR. BAILEY: I am enclosing a cheque for $15,000, with which to open a second account of ours, viz., The Collver Tours Company, Letter of Credit Account.

This in the spirit of Mr. Cumner's suggestion in your presence.

The two accounts will of course require separate end-of-the-month statements, as they will be kept separately in our books.

Please make a point (as a favor to me) of getting word to Mr. Cumner today that I have done this. I will, also, see him after Thanksgiving Day.

Steps are being taken which I expect will within a week or two make things still further to his and your liking. I am

Sincerely yours,

LEON COLLVER.

Exhibit 10.

[Put in Evidence, page 85.]

This Agreement witnesseth, that whereas the Boylston National Bank a banking corporation formed under the laws of the United States of America and having its place of business in Boston, Mass., has arranged with The Collver Tours Company, a corporation formed under the laws of the Commonwealth of Massachusetts, to guaranty the payment of drafts drawn upon certain Letters of Credit which have been and may be in the future issued at the request of said Collver Tours Company to the clients of said Collver Tours Company.

And Whereas said Collver Tours Company has deposited in said Bank certain deposits of money and has agreed to deposit
159 from time to time certain further sums of money in said Bank as a fund from which said drafts may be paid by said Bank,

And Whereas said sums so deposited are credited by said Bank to said Collver Tours Company as a special deposit for the purpose of meeting and paying said drafts,

And Whereas said Bank desires that said deposits when made shall remain in said Bank until actually used in the payment of said drafts and not withdrawn for any other purpose, and the said Collver Tours Company has agreed that said deposits shall remain in said Bank for said purpose and shall not be withdrawn for other purposes,

Now Therefore, in consideration of the premises and of one dollar paid by said Collver Tours Company to said Bank, the receipt of which is acknowledged, the said Collver Tours Company agrees that all deposits made by it in said Bank to the credit of said special deposit shall be withdrawn only for the purpose of paying said drafts issued against letters of credit guaranteed by said Bank at the request of said Collver Tours Company and shall not be withdrawn or used for any other purpose until all outstanding letters of credit aforesaid are cancelled and surrendered and that said sums so deposited shall be collateral and security to said Bank against its guaranty and obligation to pay said drafts.

It is also agreed that nothing herein contained shall prevent said Bank from resorting to all other funds of said Collver Tours Company for the purpose of paying said drafts or securing said Bank from any liability by reason of same.

Dated this eleventh day of December A. D. 1909.

THE COLLVER TOURS COMPANY,
LEON COLLVER, *President.*

160 EXHIBIT 11.

[Put in Evidence, page 87.]

Leon Collver, President and Treasurer.
F. Potter Swain, Secretary and General Manager Boston. Cable Address Revloc-Boston. Telephone 2550 Back Bay.
Captain George B. Beardsley, Vice-President and Manager for Japan and The Far East 34 Water Street Yokohama. Cable Address Collver-Yokohama.
Walter H. Woods, Manager European Department.

The Collver Tours Company, Ltd.

Home Office, 420 Boylston Street.

BOSTON, U. S. A.,
December Sixteenth, Nineteen Hundred and Nine.

GENTLEMEN: I beg to advise you that at a meeting of the Directors of the Collver Tours Company, held December 15th, it was resolved and voted to authorize Leon Collver, as President of the Company, to sign an agreement with the Boylston National Bank, whereby this Company guarantees the payment of all outstanding Letters of Credit issued to us through your Bank and as security, offers in this agreement the funds set aside as a special Letter of Credit account, as well as all other funds deposited by the Collver Tours Company in your Bank, after this Letter of Credit account is exhausted. This agreement is dated December 11th, 1909.

It was also voted to authorize F. Potter Swain, Secretary and General Manager, to sign checks against the Collver Tours Company's general account with the Boylston National Bank, such authority at present vested in Leon Collver, President and Treasurer, to be continued as well. All checks to bear the counter-signature of one of the following:

George B. Beardsley, Vice President.
Walter H. Woods, Manager European Department, or
James E. Prentiss, Assistant to the European Manager.

Yours faithfully,

F. P. SWAIN, *Secretary.*

A./S.

The Boylston National Bank, Boston, Massachusetts.

Specimen signature: 161

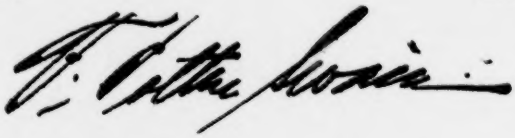

EXHIBIT 12.

[Put in Evidence, page 87.]

LEON COLLVER President and Treasurer
F. POTTER SWAIN Secretary and General Manager Boston Cable Address Revloc-Boston Telephone 2550 Back Bay
CAPTAIN GEORGE B. BEARDSLEY Vice-President and Manager for Japan and The Far East 34 Water Street Yokohama Cable Address Collver-Yokohama
WALTER H. WOODS Manager European Department

THE COLLVER TOURS COMPANY LTD.
Home Office, 420 Boylston Street
Boston, U. S. A.

December eighteenth, Nineteen hundred nine.

Gentlemen: We return herewith specimen signatures of Mr. Swain, Mr. Beardsley, Mr. Woods and Mr. Prentiss. Both Mr. Beardsley and Mr. Woods are at present away and we have therefore been obliged for the present to attach copies of their signatures which have been clipped from letters written by them.

The counter-signature will apply to all checks alike, whether signed by Mr. Swain or Mr. Collver. In this connection, please note that either Mr. Collver or Mr. Swain has authority to countersign checks signed by the other

Yours very truly,
F. P. Swain,
THE COLLVER TOURS COMPANY,
General Manager.

A/S

Boylston National Bank, Boston, Massachusetts.

162 [Put in Evidence, page 119.]

1909 **Thursday,** **FEB.**

	Balance			Checks	Deposits
Feb. 6				200	
	10746 13			61 05	5000
				738 10	
8	15485 08	371 26 d		1 90	
		12			
9	14745 08	237 69	198 d	298	
		100	100		
10	14447 08	17 15			1850
				374 92	
11	16297 08	18 29		15 71	75
		356 63 d		87 63	
12	15981 45		75	25	
			12 63	82	
13	15868 82	47 20		98 70	
		51 50			
15	15769 30	75		474 47	266 66
		5 45			
16	15561 49	73 11	1466 25	1958 42	
		320 91	438		
17	13603 07	12 90	11 97	235 23	
		208 33	28 55		
18	13367 84	14	13 65	225	
			210	658 92	
			15		
19	12483 92			8	
				1200 66	
20	12475 92	d	1187 28	70 65	
			13 38		
23	11204 61	42 70		165 89	203 20

NOTE BY CLERK. The figures here printed in large type in Exhibits 13, 14 and 15, were written in red ink in the originals. The figures here printed in smaller type in Exhibits 13, 14 and 15, were written in black ink in the originals.

		45 80		195 72			163
24	11241 92	31	50	15			
		10	24 75				
		8 14	19 62	675 55			
25	11031 20			19 62	78 75		
		28 25	100				
		7 50	1 35				
		87 65		201 75			
26	10414 78	1 56	20	180 35	721 67	700	
		78 84	160 35			1 21 67	
		475	19				
			112 50				
		25	65	2582 33			
27	10754 35	300	5 25	364 50	25		
			MCH.				
March 1		49 50		609 45			
	7832 52	15	148 30 d	135			
		1606 89 d	333 34				
		7	21 94				
		78 75	5 22				
		686 19	100 65				
		200					
		3 50					
2	7088 07	2		116 75			
		3 75		109 37			
3	6971 32	76	2 50	4 60			
		35	2 10	38 75			
4	6857 35	6 75		20			
		12					
5	6798 60	20		1 90			
				244 45			
6	6796 70	98 50		138 50	218 76		
		40		1368 71			
		2					
8	6632 51	242 45 d	2 25	47 25			
			1217 16 D				
9	5216 55	1 90	12	57 90			

164		6	1 30			
10	5158 65	50	36			
		9 15	100	265 77		
		12		10		
11	4892 88	208 33	15	73		
		6	50			
12	4809 88	26 29	8	847 32		
		4	2 31			
			495 01 d	14		
13	3962 56	45 50	100	70 50		
		25	250			
		4				
		10				
15	3878 06	100		471 50		
		371 50 d				
17	3406 56	15		50 50	3040	
		35 50				
18	6396 06		495 64 m	509 59	300	
			13 95			
19	6186 47			100	1557 40	440
				1100 33		1117 40
20	7643 87	12		59 50		
		47 50				
		991 44 d				
22	6484 03	12		73 14	150	
		92 38		25 66		
23	6560 90	4 51	59 44 d	161 54	98 41	
			39			
24	6472 11	1	60	91	308 90	
		50	3 10			
		40	15			
25	6690 01	3	5 06	100 49		
		7	5 60			
26	6589 52	90 49	10	386 66		

			100	481 70		165
			4			
27	6202 86	15	25	61	398 20	
		46 d	247 66	150		
29	6058 36	6 70		27		
		450				
30	5881 36	25	3 13	15 63	3 65 1	
			7 50			
31	5869 38		5			

APRIL

April 1				646 74		
1	5869 38	7 50		135		
		35		95		
2	5087 64	333 34		153 10	50	
		13				
3	4889 54	257 90		29 20		
		50		97 50		
		47 50		150		
5	4762 84	4 20	100	10	1250	
		25	50	757 40		
6	5852 84	107 52		21		
		5 55				
7	5074 44	644 33 d	400	478 25		
			17			
			11 25	26 80		
8	4596 19	10		10	661 66	446 66
		16 8	50			215
9	5221 05		3935 30 d	4600 66		
			665 36	296 10		
10	620 39	200		47 50	132 50	
		80				
		16 10		708 33		
12	409 29		208 33	15		
			500			
13	314 04	130		147 96	14702 78 dis	

166			15 46			
14	14240 78		2 50	50	200 55	
				55	875 64 l	
15	14040 23			95 55	15	50
					73	
16	13199 59			72	12 50	
				1	224 90	
17	13114 09		108 90 d		52 50	698
			50			
20	13534 69		5	500	863 63	
			26	108 75	3091 33	
21	12671 06		35	72	196	
			6	182 88		
			190			
22	9383 73		1622 83 d	73 20	140 95	195
			1468 50	64		
	9437 78			3 75		

1909 **Friday,**

APL.

	Balance			Checks	Deposits
April 23				47 83	
	9437 78	25 00		15	
		9 83		1708 28	
24	9374 95	13	47 50	57 05	
			9 55	4	
26	7609 62		1484 08 d	25	
			5 20		
			96		
27	7580 62	2 20	50	299 21	
		297 01 d	75		
28	7281 41			90	
29	7191 41	321 76 d		322 09	
		33 m		1482	
30	6869 32	95		114 50	235

MAY

167

May 1		15		347 34		
	5507 82	4 50	135	184 70		
		15	2 20			
		1467	47 50			
			14			
			333 34			
				213 36		
3	4975 78	25		75		
		50		8 44		
4	4687 42	163 36 d	6 20	1 25		
		50	2 24	111 82		
5	4677 73	25		75	2557 50	
		50		227 25		
6	7048 41	6 35	5 25	2 50		
		105 47	222			
7	6818 66	d	865 72	880 59	1047 50	
			7 30	106 75		
8	6985 57	50	5 67	43 50	739	650
		6 75	1 90			89
11	7574 32	50	16	20 37		
			4 37	364 75		
12	7553 95	15		65		
		50		611 50		
13	7124 20		252	240		
			359 50	777 80		
14	6272 70	4600		4615		
		15				
		564 05		5		
15	879 90	213 75	47 50	62 50	343 78	
			15			
17	1156 18		L	753 43	150	
19	552 75		20	70	50	
			50	53 41		
20	532 75	50 0		15		

168

		3 41		119 34	
21	464 34	2		372	927
		200			
		150			
		20			
		8 25			
		5			
		3			
		30			
		73 09			
22	900 00		12 50	60	140
			47 50		
24	980	2		2241 90	
		1500			
25	1261 90	200			1261 90 M.
		524 50			
		15 40			

COLLVER TOURS CO (LETTERS OF CREDIT)

1909 **Thursday,**

MAY

	Balance			Checks	Deposits
May 12					9898 33 Dis
13	9898 33				4600
17	14498 33		d	2230 11	
20	12268 22		d	123 67	
22	12144 55		d	1222 18	
				13 40	
25	10922 37	1261 90 mem		1350 65	
		88 75			
26	9558 32		541 78	663 75	
			121 97 d	3240 52	
27	8894 57			50	
				120 75	
28	5604 05	1 33 m		277 33	13 65 I

		9		915 50		169
		4				
29	5219 63	250	49	124	1248 40	
		4	25			
		4	50			
		5	40			
		30 75	8			
		90	125			

JUNE

June 1		d	742 50	333 34		
	5428 53			25	8588 70	7313 70
2	13658 89		d	1336 06		1275
3	12322 83	2		222 72	600	
		1 50		20		
4	12700 11	106 47		3		
		3 75				
		10				
5	12677 11	99 d		49	2034 35	862 50
7	14662 46	24 77 d		1279 42	100	1171 85
		468 88				
8	13483 04	239 89	209	409 57		
		545 88	20			
			22	498		
9	13073 47	6 50	20	21 50	670 50	
		15	100			
10	13224 47	400	38 57	851 46		
		25	80	207		
		73	500			
11	12373 01	15	58 50	64	2720	
		49	180			
		148 50 d	32 96			
		8 50		230 65		
12	14822 01	50		275	548 45	
		25				
		250				
14	14864 81	4	2275 62 d	3254 31	916 66	216 66

170		100				
		120	471 20	68		700
		6 65	150			
15	12527 16	9 90	57 49	29 90	1028 26	28 26
		20	100			
		50	200			1000
		18				
				1001 95		
16	13457 52	371 61		75	738 75	187 50
		368		917 20		551 25
		50				
18	13119 32	4	20	169	1288 93	
		208 34	49			
			100			
19	13322 05		519 75	1007 22 L		
			210 50			
21	12314 83	90	186 95	1154 08	1060	
		10			935 25	
		73 20				
22	12220 75	980 88				
				15		
23	13156	200		1870	1247 50	
		300		826 30		
24	12518 50	400	42 75	82 75	679 25	
		150				
		800	40			
		20	d 74 30			
			300			
			42	1855 19		
25	12288 70	100	160	204	638 59	
		55	250			
		49				
		180 35				
26	10868 10	225 32	125	3051 25	1674 10	
		159	214 75			
		495 32 d		15		
28	9490 95	296 75	981 50	2805 90 L	17 37 1	

			200			171
		50	1530			
			20 89	1147 04	357 50	
29	6687 42	448 45 m	50			
			588			
			488 15			
				392 62		
30	5897 88	50		215	3351 25	671 25

JULY

July 1, 1909		150				2680
	8641 51	15				
		384 62				
		8				

COLLVER TOURS CO IN ACCT WITH THE BOYLSTON NATIONAL BANK BOSTON

1909

JULY

	Balance			Checks	Deposits
July 1, 1909			260		
			543 71		
		333 33			
		187 50	250	18 80	
	8641 51	1	123 84	1698 38	366 30
			4		
			206 50		
2	5429 43	n	2227 54	2621 96	336 57
			83 92	79	
			100		
3	3144 04	300		1265 43	
		408			
		107 97			
		280	38 28		
		125	10 04		
		44 46	3		
		150	4 50		
6	1799 61	86 65	513	568 82	
		24 40	75	1 10	
		14			
7	1230 79	100	63 50	138 50	4401 25

172			50		376 89				
					5				
8	5492 44		1 25		110		426 30		
					150				
					100				
9	5066 14		83 92		200	m	941 89	4936 71	
			200						
			6				34		
10	9060 95		495 64	I			785 56		
12	8241 39							216 66	
							5000		
13	8458 05				485 73	I	100		
					2		15		
14	3358 05				50 10		140	50	
					113 60				
15	3253 05				100		949 43		
16	2303 62				3		25		
			24		49 58		54		
17	2278 62		30		35 15		87 73		9829 17 D
					3		33		137 16
19	2136 89				30		5000	10061 83	35 50
					653 80				
20	7105 72				148 50		802 30		
21	6303 42		197 88	FD		L	1474 03		
			99	"			15		
22	4829 39		123 67	"			420 55	148 25	
					414 40				
23	4542 09	FD	123 39		50		465 40	160 42	
		FD	148 32		25		39		
24	4237 11		150		100		125		
			11 27		231 32				
26	4073 11		50		208 34		483 18		
			50		1 10				
27	3589 93		252		4 50		445 26		
			46 61		15		50		
28	3144 67		120 42		35		481 53	6 81	Int

		12 50 FD	74 20				173
		"	74 20				
29	2619 95	150	25	173 40			
		101 25					
30	2446 55	54 57 m	40	668 23			
		1 60 FD	74 20				
		15					
31	1778 32	59	371 02	379 82	27 50		
		21 20 "	98 94				
		"	74 20				
		"	49 47				

AUG

			333 34			
Aug 2			150			
	1426	m	306 70	790 04		
			100			
3	635 96	107 17	394 88	494 88		
		100				
4	141 08	5		212 17	1000	
			643 11 I	1 50		
5	928 91		21 14	664 25		
			1 20			
6	263 16		15	16 20	500	
				39		
7	746 96 I		351 01	941 11	100	
			10			
			12			
			568 10			
	Overdraft					
9	133 15		150	15		
			3	1 10	30 23	
10	148 15		158 18	311 18	2500	
11	2069 80			35 83		
12	2033 97					
13	2033 97	434 77 I	n	5000	4915 27	Dis
		8 50		234		216 66
14	1949 24	20 68		463 95	2256 66	160

174						
16	3507 95		D	49 41	248 87	1880
			D	59 29		
				5 17		
		25		5		
				5		
17	3259 08	4 50		5	29 50	
				20		
18	3229 58	74 06		100	37 20	
		187 75				
19	3192 38	24 68			286 49	
		39		30		
20	2905 89	31 60		208 33	271 46	120
		250		17	420 60	
21	2754 43	100		3	1266 33	
				98 75		
				148 13		
				246 87		
				19 75		
				74 06		
				123 44		
					18	
23	1067 50				4 50	
24	1045				50	
25	995				20	
				11 97		
26	975	5		1	12 97	
		246 87				
27	962 03	45 77		5 10	297 64	
				1 10	59	
28	664 39			20	26 20	
30	579 19	150			125	
		50	D	197 50	300	
31	457 70	100		25	222 50	500
				SEPT		
Sep				71 94		
				333 34		
1	435 20	123 51		9	414 28	600

						175
		67 50				34
2	620 92	101 95	.	292 96	184	150
			42	49		
3	511 96		150	192	495 83	Dis
4	766 79			100		
7	666 79			106 97		
			3 50			
8	559 82		1	1 15		
			25			
9	558 67		14 62	44 12	268	
				10		
10	782 55			14 90	2500	
		610	49	149		
11	3257 65	327 25	100	333 35		
		15		10025		
		14 40	25		38 30	
13	2775 30		w10000	164 40	9743 33	Dis
				15		
14	2367 53			25		
15	2327 53				216 66	
16	2544 19		50	41 56	3106 25	
			80			
17	5608 88		98 75 D	228 75		
		25	156 84	174		
		49	35			
18	5380 13	100	99 93	285 77	16 60	
			444 96			
20	4936 96		20	673 29		
			208 33			
21	4263 67		6			
		15	10	90		
22	4263 67	75	30	46	50	
				15 50		
23	4177 67		D	246 87		
24	3915 30			1000	50	

	176				49	
	25	2965 30			13	
					15	
	27	2903 30			4	5500
	28	8384 30				
			226 22		20	
	29	m	6 65	100	232 87	2 68 Int
				60	310	
	30	8134 11	125	150	100	
				OCT.		
			333 33	150		
				5		
	1	7724 11	71	100	529 33	5400
				100	49	
	2	12594 78	D	739 68	1094 68	216 16
		c	1500		2006	
			6	6		
	4	11667 26	500	107 37	123 54	3150
			15	10 17	15	
			44 50	52		
	5	12687 72	150	1739 02	209 50	10
				100		
				3 50		
	6	12473 22		2	11896 52	
				15		5800
	7	10576 70		60	75	5403
	8	21704 70			20	
				915 34	49	
	9	21684 70	15	17 50	932 84	233 04
			32 09			
			15 79			
	11	20935 90	46 31	50	109 19	70
				97 15	3050	
			50	25		
	12	20896 71	3060	c	172 15	2650
				208 33	364 44	
	13	20324 56		13 13	224 46	

14	19735 66		2	25	617 70	177
15	20328 36		1 54 13	55 13		
16	20273 23	20 49	D	69 985 62	5321 63	
18	24540 24		6 50			
19		16 372 40	2 20 33 24	34 30 91 44	212 50	
20	24627 00	120 4 97	3276 65 34 49	513 37		
21	24113 63		39 156 15	3506 29	99 28	
22	20706 62		25 50 250			
23			586 82	64		
25	19794 12		6 18	868 50	20	
25	19794 12		50 29 50	15 79 50	90	
26	19789 62			50 6		
27	19733 62			3 90		
28	19729 72	40 75	1045 86 11 02	15 1056 88	20 27 42 Int	
29	18705 26	350 233 02	m	244 70 17 76		
30	18442 80	13 93 123 51 D	1 10 64 00	65 10 761 23		

NOV.

Nov			25	409 30		
1	17616 47	150 195 23	1 333 34	345 23		
2	16861 94	500 100	49 96 20	600 126		

178		4346 63	100			
		109 27	6			
3	16135 94	150		4605 90	9902 46	
			45 75	15		
4	21432 50		15	420 75	303 40	
			125			
			35			
		57 25	100			
		3 70	100			
5	21300 15	30		90 95		
			476 63	64		
6	21209 20		8 50	485 13	20	
8	20680 07		235	28		
			6			
9	20652 07		137 50	378 50		
		100				
		25	15 20			
10	20273 57	25	161	176 20		
		30				
11	20097 37	70	10	250		
			46 10			
12	19847 37		D 197 88	253 98	96 25	
		338 75	5 68	410 75		
13	19689 64	72	539 32	573 00		
15	18705 89	120	28	350 32	106 60	
		140 32	6	20		
16	18462 17	60	80	86	3225	
		30	35			
17	21581 17		99 62	134 62		
				10020		
			20	D 296 82	9801 67	Dis
18	21446 55	n 10		257 13 L	643 60	
			10 26	25		
19	21317 87		371 26	448 02	1892 50	
		586 82	60	64		
			2 50			
20	22737 35	2408 26	4	3243 96	75	

		6 18				179
22	19504 39	24 70	550	60	128 30	
		30	114	60 56		
23	19572 69	8	2 50	666 50		
		180	17 50	15000		
24	18845 63		484 50	75	4042 50	
			274 80			
26	7813 13		335 03	1206 83	2550	
			95			
				64		
27	9156 30			25	50	
				D	321 55	
29	9117 30		125	m	18 27	30 87 Int
			75			
30	8858 35		9			146 30

DEC.

Dec.					
		50	333 34	180	
1	8954 65	130	4	546 34	175
2	8403 31		252 51	633 38	2966 61
			150	25	
		1 70	100		
3	10736 54	735 75	4 62	737 45	5320
		64		69 45	
4	15294 09	5 45	126 25	273 26	
	D	173 26	2		717 77
			113 37		
6	14951 38	100	100	1166 21	265
			208 33		
		D	544 51		
		30	27 75		
7	14767 94	10	14 52	42 27	
		10	492	7000	
8	14725 67	390 50	5 45	497 45	
		303 22			
9	7228 22	10	21 52	753 72	170
			2043 73		

180		33	17 09	58	
10	6644 50	25	3	2085 34	26 55
		10	49	64	
11	4527 71	8	50	99	1614 84
		26 50			
		120	62 n 5		
13	5979 55	25	350	195 50	1063
		6	14 63	15	
14	1847 05		10	436 63	4874 17 Dis
			35		
15	6269 59	334 39	30	65	
		12 50			
16	6204 59	10	56 56	356 89	229 42
			7 42	25	1000
17	6077 12	27 75	100	163 98	
		8 50		64	
18	6888 14	7 10	5	43 35	117 50
			5		
20	6898 29		43 56	53 56	100
21	6944 73			73 20	
			4	15	
22	6871 53		20	24	
				109	
23	6832 53	7 92		87 50	
				297	
		6		130 92	
24	6339 03	117	m	87 50	
27	6120 61			60	150
28	6210 61			61 75	41 55 Int
29					
			7 85	1	67
30	6190 41	130	4 m	1 62	87 50
		81	135		
31	6342 29	15	25 75	172 60	3065

JAN. 181

Jan. 1910							
1	9008 69	125 333 33	75 64	139 458 33	200		
3	8611 36	3895	990 660	1650	1043		
4	8004 36	100 98 45		45 4093 45			
5	3865 91	100 100	1 35 10	11 35			
6	3854 56	25 111 87	150 15 25	1000 614 87	3026 66		
7	5266 35	278 17 33	16 68 536 92	5 55 718 85			
8	4541 95	208 34 25	12 50	69 250 67	1461 25		
10	5683 53		10 6 90	29 40	1818 75		
11	7472 88	3 15 183 87		50 19 50			
12	7403 38	1 50		252 87			
13	7150 51		1 6	7 75	250		
14	7318 51			60 12	185		
15	7431 51		6 10	83	285		
17	7617 51	335 91 27 50	25 75	100 138 80	40		
18	7418 71	70 372 40		805 81	220		
19	6832 90		2 5 30	1875			
21	4957 90		6 2 50	41 50 605 25	2830	2775 55	

182		9		54	
22	7141 15	25	3 50	1217 30	235 47
		25		6 60	
24	6105 32	80		139	1590
25	7549 72				
			2 10		
26			25	27 10	
27	7522 62			50	
				m 4 14	33 30 Int
28	7472 62			787 50	768 75
			63		
29	7483 03		45 66	108 66	150
		25		40	
31	7524 37	130		155	460

FEB.

Feb.			71 66		
1	7789 37	16 66	333 34	405	
		125			
		120		m 10	
2	7384 37	1235 40		1735 09	
		38 03	35		
		150			
3	5639 28	50	15	50	285
4	5874 28	25		114 38	366 66
		39 38	83	108	
5	6126 56	50	25	1293 67	165
		4 50	112 57		
		8	75		
		208 34	100		
		4	6 10		
7	4889 59	4 46		269 30	260
		40			
8	4880 59			925	4004 76
			15 99		
9	7960 35		12 50	28 49	300
10	6231 86				

			10	20		183
11		75	774 12	784 12	211	
		23 75	49 88	99 75		
12	7627 74	1	200	249 88	165	
		10	22	n 10000	460	
14	7443 11	25 50	50	72	9696 67 dis	
		50	50			
15	7527 78	15 68	20	101 18	50	
		4	120			
16	7476 60		460	4650		
			225			
17	2826 60		100	12	368 71	
			40			
18	3183 31		15	3 80		
			89 77		10	
19	2803 31	4	32 45	122 22	400	
		63 75		30		
21	3091 09	22		485 75	225 62	
23	2800 96	100		20		
		2 25	72 98	50		
24	2780 96	20	262 85	335 83	364 46	
		10	m	2 69		
25	2759 59	20		152 25		
		25	491	119 25		
26	2604 65	93 25	4 93	495 93	121 90	
			34 73	130	260	
28	2111 37	333 34	20 07	54 80	24 59 Int	

MCH.

March		125			
1	2211 10	10		468 34	290
2	2032 76			613 50	
			16 66		
3	1419 26		150	166 65	315
		7 88			
	1567 61	200	18 65	207 88	216 66
		50	137 42	148 30	
	1576 39	98 20	100	256 07	543

184			16 54			
7	1715 02	59 50	23 92	70 46		
		4	20			
		10	10			
8	1644 56	10		183 50	195	
		50	1			
9	1656 06	50	3	4	1210	
			15 20			3820
10	2862 06		280	314 95	7375	3555
		50	19 75			
11	9922 11	3 50	25	53 50	218 32	
		102 30	30	152 30		
12	10086 93	50	208 33	263 33		
			2180 72			
			100			
14	9671 30		30	2310 72		
15	7360 58	25		1782 77		
		1 25				
16	5577 86	100	150	126 25	873 16	
			11 10			
17	6324 77		24 84	185 94	805	
		50	n 10			
18	6943 83	3 60	985 75	53 60	9843 33	Dis
		50	100	154		
19	6733 56	104	100	1185 75	305 37	
		1				
21	5703 18	6	25	189 73	1290	
		14 64	20			4043 80
22	6803 45	95	1000	1045		90
		73 09	38 70	700	4133 80	
23	5758 45		1471 50	1650 20		
			140	82 50		
24	7542 05			1937 50	890 25	
			20			
25	6412 30		45	65	4220	
		107	2 50	136		
26	10567 30	29	488 50	491 00		

28	9940 30		53 28		4145		185
			1630 25	2000			
29	14085 30		2933 32	4616 85	583 75		
			405		11 88	Int	
30	8052 2[illegible]	m	3 54	453 04	492 75		
		1875	49 50	2005			
31	8103 79	130	615 75	1786 47	25		

APL.

April			2 50				
			10				
1	4337 32	15	820 98	1278 33			
		2 50	200				
			100				
		333 33	37 24				
		20					
		782 50	5				
		125	2 50	101			
2	3058 99	30	4 25	11 75	558 25		
		15 96					
4	3504 49	50	150	95 96	2177		
		4	400				
5	5585 53	579	300	850			
		28 50	10 85				
6	4735 53	150	151 02	761 50			
			145			305	
7	3974 03	2 50	8	314 87	1093 75	788 75	
		731 05					
8	4752 91	100		835 55	295		
		2 05	85 50	102 33			
9	4212 36	18 90	975	1060 50	325		
		700					
11	3374 53	47		767 95			
		75	20	225			
12	2606 58	150	100	120	785		
		22	1231 63	1700	1155		
		20					
13	3046 58	25	2450	109 95	4975	Dis	

186		12 95	83			
			2 50			
14	7366 63		19 90	3787 03	1000	
				900		
15	4579 60			991 98 L		
			60	118	690	
16	2687 62		50	1008 77 L	216 66	
18	2467 51	722	50	160	135	
		175				
19	2442 51	30	147	20	799	
			366	927		
20	2442 51		73 17			
		100	16			
21	2294 51	22 67	5 32	607 49	505	
		4 62				
22	2192 02	30	200	157 29		
		1500	149 99	1700	11462 13	
23	2034 73	200	140	489 99	1502 45	
			10			
25	12809 32	200	100	357 18	1566 50	
		100	177 18			
		25	50			
			20			
		10		1500		
26	14018 64	294 38		629 38	12406 48	
			1 50			
27	24295 74	5	16 12	17 62	4391 63	
		1257 77				
28	28669 75	7 50		1270 27	1890 61	
				2225 97 L		
29	29290 09		5 26	m 6 82	4 47 In	
			20			
30	27061 77		33 75	4164 16 L	9676 49	

MAY

May			25	150		
2	32574 10		150	234 01	245 52	

3	32435 61	1446 52 3000 20 180	1 183 33 3 138 90	4446 52 930 56	350	187
4	27408 53	376 70 7 111 75 42 978	208 33 100	1715 45	10328 06	
5	36021 14	9 73 125 87 10 13 40	11	235 23 38		
6	35747 91	348 65	334 20 62 81	566 06 L	2640 31	
7	37822 16	100 2135 13	1349 50 90 25	300 1847 76	2917 72	
9	38592 12	1026 64 07 1040		5096 66 L	3115	
10	36610 46	52 1706	60 10 25	6471 85	583 22	
11	30721 83	20 16	492 4 50	566 75	1833 62	
12	31988 70	1097 25 25	177 50 4 25	5000 1158 25	680	
13	26510 45	14 7350 980	200 50 484 50	5000 866 75	9632 75	
14	30276 45	792 123 50		9259 50	1869 50	
16	22886 45			608	7858 50	
17	30738 87		2	140	7044 89	
18	37643 76		44 50 30	300 5015 25 L		
19	32328 51		240 128 14	128 14 514 50		

188						
20	31685 87			476 24 L	15768 61	
				92		
21	46978 24		9	2868 43 L		
			657 38		1125 75	
23	44017 81		64 87	731 25	5942 10	
		810		m 100		
24	50354 41	142 50		952 50	2695	
			31 27 m		1115	
25	51996 91		3675	8942 94 L	100	
			870 50			
26	44268 97	254 11	664 50	8764 36 L	4439 30	
		100	52			
		301				
27	39943 91	242 55	220 42	5513 69	887	
		549 93				
28	35317 22	4515 64	52	5963 23	54 59	Int
			140			
			209		7105 50	
31	29408 58	200	190	2999 03 L	11858 44	
			JUNE.			
June		235 12	50	150		
1	45373 49	577 12	400	1041	3490	
		981 04	80			
2	47672 49	150	305 50	2143 28	3410	
		60 95	152 42	115 08		
		29 25				
3	48939 21	24·88	15 10	1056 40		
			30			
			419 50			
			53 88			
				551 29		
4	47767 73		33	5641 60 L	18232 92	
			95	c 5380 52		
6	59807 76		20	3146 95 L		
			9 75			
7	51280 29	121	31 30	4904 55 L	8497 82	

		57		49 12			189
		450					
8	54873 56	33		140	378 17		
		1607 77					
9	54495 39	50			2318 77	8548 63	
10	60725 25			537 37	7918 35 L		
				995 68	1000		
11	52806 90			25	3955 31 L	13523 15	
				44			
13	61374 74			308 75	1910 80		
14	59463 94				2078 75 L	9272 61	
				62	c 5688 03		
				109 25			
15	66657 80			220	10186 90 L	11528 36	
		3923 25	c	20	7131 50		
16	62311 23	3208 25	c	28 34	439 59		
					558		
17	54740 14				3225 83 L		
18	50956 31				20		
				10	24097 25		
20	50936 31			14097 25	5381 88	15006 15	
		490 25		42	550		
21	36463 33	907		25	6305 54	2445 75	
		127		17			
		365		820 10			
		2586 07		1 20	1348 73		
22	32053 54	255 75		467 50	1372 80		
		2474 40		295 69	8120		
23	29332 01	260		6863 82	3330 83 L	8709 06	
		7860		705			
24	26590 24			149 84	8830 35		
		1854		744			
		2050		72			
		111 19					
		181 60			50	4647 36	
26	17759 89	4 50			5948 17	1035	

190		1696 88		15		
27	17444 08	50		3225 88 L	7022 50	
				3 04		
28	21224 70			3919 40	994 75	
			m	359		
29	18297 01		m	35 73	67 94	Int
			m	1097 12 L		
		150		3791 96	51 56	
30	16873 10 c	3641 96		1953 64 L	4449 75	

JULY.

July						
1	15628 81					

THE COLLVER TOURS CO IN ACCT WITH THE BOYLSTON NAT BANK BOSTON

JULY, 1910.

July 1910				542 14		
	15628 81	183 34		4753 73 L		
		294	86	586		
2	10332 94	5	500	2784 22 L	701 13	
		87 13	210	476		
		62	50			
5	7663 85	208 33	216	340 41	4150 60	
		7	39 50			
		8	659 72			
6	10998 04	380	40	4286 35	2936 25	
		12	68 50			
		25 85	165	1000	1924	1565
7	9647 94	245	3313 63	886 18	4987 50 =	
						Dis 359
		48 25	6 75			
		484 46	146 75	5601 25		
8	14673 26	251 86	4516 31	c 3191 50	935	
			146 87			
		735	98 75	97		
9	6815 51	158 16	8	999 91	1082 88	
			393 40			
		39 50	14 45			
11	6801 48	435 60	42	924 95		

		20		c 79 02			191
		13					
12	5876 53	540		573	591 61		
13	5816 12			25			
			1462 95	c 1680 45	200		
14	5791 12	73 30	217 50	1225 92	L 4950	Dis	
		85 50					
		26 55					
15	8034 75	25		210 35	1373 12		
		212 75	157	1137			
		100					
16	9197 52	100	c 980	550 25			
		17 50					
			66				
		120	49 50		200		
18	7510 27		7 61	4558 45	24476 50		
			583 75				
		5000	3851 59				
		986 97					
		202 88					
		261 25					
19	27628 32	49 88		6500 98	432		
			603 75	25	5977 75		
			125 30				
20	21559 34		49 85	778 90	101 07		
		30					
		16					
21	26834 26	5723 90		5769 90			
		56 64	24 87	5			
22	21064 36	219 20	149 99	174 86	12 44		
		235 12	67	1365 71			
		1365 65	75				
23	15901 94	883 30	c 738 41	2759 91			
			c 485 30				
			39 58				
25	11776 32		159 80				
			700				
			33 75	1223 80			
			70				
		728 78	220 67				
		500					

192		1 52		25		
		437 26				
26	10552 52	232 75		91 25	434 64	
			69 51		480	
		67 63	107 75			
27	10870 91	59 50	2 50	2027 44	16 52	Int
		10 98	57			
28	9339 99	313 52	166 38	403 14	14 10	
		1163 77		c 2508 19		
		90 38	2065 38			
29	10346 85	7 57	m 1173 63	1586 22		
			12 35			
30	6252 44		38 60	3289 96		

AUG.

		227 15				
August		86 90				
1	2962 48	617 70		931 75		
					2242 24	
2	2030 73				224 24	
				m 216 66		
3	4497 61			25		
			24			
4	4255 95		183 33	207 33	9922 50	Dis
				221	1772 67	
			71		100	
5	13971 12	6 50	150	150	216 66	
		146 37	125			
6	15687 45	1312	204 96	329 96		
		8000				
		1162 66			3581 50	
8	15359 49	1235 40		10564 05	60 50	
9	8437 44			208 33		
10	8229 11		37	4243 20		
			1930 46	c 760		
11	3985 91		75	2042 46		
12	1183 45			100	17 50	
13	1100 95				351 75	

15	1452 70				3748	193
			485 25 m	10000		
16	5200 70		966 60	1451 85	9911 67 Dis	
17	3660 52	196 75 = 10	F draft	27 50	134 72	
18	3767 74	4	152	210 75	250	
		88 50	644 25	60	196 75	
		11 25				
19	3806 99	85 50	67 30	863 55	14 61	
		1930 75				
20	3094 80	17 35		2133 35		
22	961 45			1 73	2873	
			349 24	c 969 45		
23	3832 72		295 90	645 14	69 44	
			253			
24	2287 57		3 50	256 50		
25	2031 07			276 26	2800	
26	4554 81			2502 75		
			56 74	69	965	
27	2052 06	25	10 15	66 89		
		10	24 30			
29	2881 17	23	441	58	2600	
			1413 10	c 586 82	30	
30	5423 17		550	2436 26	6 55 Int	
		10	7 86 m	250		
			150			
31	2436 64	6 17	100	16 17	2894 33	

SEPT.

			114 49			
Sept			491 50			
1	5064 80		198	804 09		
2	4260 71			183 33		
		20	47	53 70		
3	4077 38	486 25	6 70	506 25		
			124 27	n 5000		
			50		100	
6	3517 43		110	304 46	4987 50 Dis	

194		486 25	20 19	25		
7	3300 47	13		499 25	278 44	
		18 40				
		100 75	9			
8	3054 66	125	608 66	617 66		
		30				
9	2437	350	50	624 15		
			50	88		
			5			
10	1812 85		1350	1455	7905 40	
			2898 05	5000		
12	8175 25	4	23	2921 05	2702	
		2459 26				
13	2956 20	25		2488 26		
14	467 94				50	
						200
						500
15	517 94			183 75	812	112
					100	
			114	100	100	
16	1146 19		100	976 50	5289 38	
			700	78		
17	5559 07		150	1064	2625	
		21 25				
19	7042 07	109 50		130 75	158 09	
20	7069 41			3319 36 L	6875 05	
				5000		
21	10625 10		70 30	3395 85 L	5172 50	
22	7401 75		489 25	225	2625	
			3 50	45		
23	9801 75		151 30	714 35		
		48 85	50	128		
24	9042 40	1173 64	78	3800 44 L	3310	
		57	1 69			
26	8423 96	7 65	145 92	1287 14		
			26 26		508 75	
27	7136 82		1855 44	2029 31	700	
			246 25		3400	
28	6316 26		308	554 25	5 22 Int	

			150	176 84			195
29	9167 23		m 26 84	1294 96			
			5				
		365 41	150	5262			
30	7695 43	235 80	112	601 21	63 59		

OCT

Oct			150				
1	1895 81		295 60	445 60			
		5000 n		5333 33	4323 22		
		183 33	22 00	29 90			
3	1450 21	150	7 90	125	2462 08	Dis	
		7 55	m	216 66			
4	2747 28	3 75	4410	11 30	170		
			7 04				
			1 21				
5	2689 32		2 28	4420 53	5793		
6	4061 79		333 98		254 11		
			309 80	61			
7	4315 90		71 25	715 03		3590	
		948 56	359 30			2621 40	
8	3539 87	5 87	2 28	361 58	17411 40	11200	
		50					
10	20589 69	100		1104 43	4000		
			7 65				
			212 25				
11	23485 26		25	c 800	5800		
			7 87	c 2347 26			
			303 80				
13	28485 26		32	588 57			
			15 60	n 5000			
14	25549 43		19 02	1015 71 L			
		61	25	86			
15	19533 72	25	16 88	87 34	13 13		
		7 87	7 84	189 96			
17	19373 51	8 31	3	224 51			

196		208 33			
18	18959 04	24		586 82	38 98
		50			
		17 04	50		
19	18411 20	38 88	100	150	783 18
		65		20	
20	19044 38	26 36		221 28	
			2934 08		
21	18803 10		18 95	2953 03	
			396 90	401 34	
22	15850 07		202 74	599 64	
			55		
24	14849 09		250	305	100
			10		
25	14644 09		74 05	84 05	47 95
				120	
26	14607 99	3371 20		605 82	
		92 63	50		
27	13882 17	475	54 63	104 63	19 65 Int
			100		
		97 40	500		
28	13797 19	1960 m	4 28	6600 51	
			57 75		
			287 55	55	
29	7196 68		355 30	700 60	89 74
			100		
31	6530 82		85 50	185 50	199 76

NOV

Nov				150	
1	6545 08			100	
			125		
2	6295 08	321	150	275	1239 50
		38 58	98		
3	7259 58	3185	4 90	588	4019 56
		208 33			
4	10691 14	22 50		3775 41	240 50
			698 54	1285 36	
5	7156 23		586 82	333 34	

			147 82			197
			980			
7	5537 53		100	1227 82		
8	4309 71				241 66	
9	4551 37				30	
10	4581 37		196	19		
			20			
11	4562 37		22 63	238 63	106 55	
			15 93	61		
12	4430 29		20 45	36 38		
14	4332 91			171		
			20	111 18		
15	4161 91		91 18	20		
			3 32			
16	4030 73		780 35	783 67		
		25				
		213 47				
17	3247 06	20		258 47	58	
			7 75			
			475 97			
18	3046 59		30	513 72		
				61		
19	2532 87			18		
21	2453 87					
22	2453 87					
23	2453 87			10		
			8			
25	2443 87		10	18		
26	2425 87			55	122 50	
28	2493 37			50		
			16 50			
29	2443 37		m 20	16 70	7 68 Int	
		5 50				
30	2434 35	7 04		12 54	54 26	

198 **DEC**

		1500	m		3530		
Dec		130		150			
1	2476 07	1900	c	333 34	483 34	40	
	Overdraft						
2	1497 27				a. a. 2 73	1500	m
				Acct closed			

[Put in Evidence, page 119.]

	Balance			Checks	Deposits	
June 1907			5			
1	313 34		33 33	38 33	300	
2	575 01					
			7 50			
3	575 01		25	32 50	324 15	
4	866 61				3916	Dis
5	4782 66			12 40		
			25			
			300			
6	4770 26	183 33	300	625		
		5				
7	4145 26	268 16		456 49		
		34 02	519 90			
		37 75	9 04	75 27		
8	3688 77	23 50	31 25	560 19		
			25	24 15		
10	3053 31		25	50		
			20			
11	2979 16		100	120		
12	2859 16		25	25		
13	2834 16		812 97		55 25	
14	2834 16		100	912 97		
			40 59			
			500			
15	1921 19	8 34	8 34	548 93		

17	1372 26					199
18	1372 26					
19	1372 26			73 14		
20	1299 12		50	8	354 37	
			3			
			30			
21	1645 49		19 50	102 50		
		3		28 71		
22	1542 99	6 65		9 65		
			30			
24	1504 63		358 48	388 48		
		25				
		1 75				
25	1116 15	25		51 75		
			103			
26	1064 40		50	153	200	
27	1111 40					
28	1111 40			6 50	331 12	
				28 30		
29	1436 02			3 75	193 42	
July			65	398 33		
1	1597 39		333 33	46		
2	1153 06					
3	1153 06				75	
4	1228 06					
5	1228 06			20		
			10	202 31		
6	1208 06		192 31	18 35		
8	987 40			22 90		
9	964 50			2		
10	962 50			11 84		
			10 80			
11	950 66		1	110 80	50	
		2 50				
		11 62				
12	889 86	183 34		197 46		

200						
13	692 40			10 50		
			62 50			
15	681 90		62 50	125		
16	556 90			25		
				167 50		
17	531 90			23 05		
			6			
18	341 35		4 80	10 80	150	
		4 75				
	135 13	202				
19	345 42	7 62		214 37		
20	266 18	2		5		
		64 20	23	31		
22	261 18	6 35	8	72 55	620 08	
23	777 71				50	
			111 39			
24	827 71		91 20	202 59		
25	625 12					
			6			
			40			
26	625 12		40	86		
			40			
27	539 12		27 64	67 64		
		25				
29	471 68	20		45		
30	426 48			56 50		
		10				
		10				
31	369 98	175				
Aug		9		65		
1	369 98	4 25		208 25	25	
2	121 73			6 13	133 46	
				51		
3	249 06			30		
4	168 06				50	Col

			25			201
6	218 06		39 13	64 13		
		35				
7	153 93	5 40		40 40	32 82	
8	146 35				100	
9	246 35			30		
10	216 35				18 33	
12	234 68			30		
13	204 68			8 13		
14	196 55			125		
15	71 55					
17	71 55			30		
19	41 55				150	
20	191 55					
23	191 55			30		
1907 Aug						
24	161 55			10 30		
26	151 25					
			25			
27	151 25		21 72	46 72	330	
			16 63			
28	434 53	28 25	108 33	124 96	350	
		10				
29	659 57	11 62	81 80	49 87		
			275 m	15		
30	609 70	65	8 33	365 13		
		26 88				
		15 50		173 38		
31	244 42	66		59 50		
Sept			16 63			
3	11 54		10	26 63	47 40	
4	32 31	2 25			50	
		20	518 70			
5	82 31	183 34	74 09	592 79	2725	

202 6	2214 52	183 34	125 25 470 45 250 40 70	911 15	
7	1303 87	84		482 93	90
			5	30	
9	930 44		1 90	6 90	
10	873 54				
			83 33	6 77	
11	873 54		2	40	6950 95
		m 50	88 44	1 09	
12	7777 72	m 59	310 81	682 58	
		m 50		16 50	
13	7094 05	16		8 88	
				25	
14	7068 67			10 64	
16	7033 03				
			50		
17	7033 03		32	82	2700
18	9651 03			125	
		25			
19	9526 03	23 26		48 26	
			21		
20	9477 77		100	121	
		41 12		174 12	
		8			
21	9356 77	125		4	
22	9178 65			125	
			23 70		
24	9053 65		360	383 70	
25	8669 95				
			50		
26	8669 95		50	100	
			100	125	
27	8569 95		25 m	6 75	
		125	1954 50	146 04	
28	8438 20	21 04	60	2014 50	26 46

		75		408 33			203
30	6304 12	333 33		101 36			
							1400
Oct		2000	30	2400			150
1	5794 43	400	10 50	40 50	13250 00		2700
2	16603 93			3000	5980		
3	19583 93			25	147 85		
4	19706 78			200			
5	19506 78						
				125			
7	19506 78			213 30			
			183 34				
8	19168 48		6 76	190 10			
			75	2 83	2600		
9	18978 38		95	170	150		
				10 10			
10	21555 55	4 04		1000			
		18					
11	21256 55	25		47 04			
12	21209 51		10		50		
			1 25				
			5				
14	21259 51		100	116 25			
				2000			
15	21143 26			13 77			
			107	84 27			
16	19129 49		13 30	120 30			
		10					
17	18924 92	1 32		11 32	5650		
			6 10				
18	24567 60		13 48	19 58			
		15	100	150			
19	24544 02	135	250	350			
21	24044 02			21 95			
25	24022 07		97 30				

	204			25			
				2 50			
23	24022 07			5 25	377 55	3063	
		7 50					
24	26707 52	181 15			188 65		
25	26518 87				5 75		
		100	-	3 50	128 05		
26	26513 12	28 05		344 05	347 55	2725	
28	28762 52				80	2900	
29	31582 52						
				63 50			
30	31582 52		m	25	63 75	75	E Oct 9
				121 58	728 33		
		150		7500			
31	31593 77	578 33		25	7646 58		
Nov							
1	23218 86				1171 20		
				5 50			
2	22047 66	5392 42		31 50	37		
		20					
4	22010 66	25			5437 42		
5	16573 24				30		
				1 50			
6	16543 24	171 93		10	11 50		
		294 73					
7	16532 74	183 34			650		
8	15881 74	21 00			6 41		
		26 55			52 05		
9	15875 33	4 40		42 80	50	157 41	
				150			
				7 75			
11	15930 69			75	275 55		
		34 15			330		
12	15655 14	3 75			37 90	50	
				150	169 55		
13	15337 24			19 55	530	100	

14	14737 69			6500		205
15	8237 69			3305 28		
			156 25			
16	4932 41		5	47 50		
		1	152 70	205 68		
18	4884 91	204 68	3	316 95		
			205 74	100		
19	4362 28		57 75	263 49		
		15 36				
		16 88				
20	3998 79	25		57 24		
21	3941 55			129		
22	3812 55				463 69	
			73 05	33 01		
23	4276 24		75	73 80		
			1 35			
25	4169 43		9	10 35		
26	4159 08					
			18			
27	4159 08		5	518		
			24 m	35		
29	3641 08		25	49		
		183 33				
		75		353 33		
30	3591 73	95		4 63	134 60	
Dec						
2	3368 37					
				25		
3	3368 37			150		
4	3193 37			30		
			78 60			
6	3163 37		94 15	172 75		
			1	27 37		
		3 50	5			
7	2990 62	23 87	183 34	189 34		
9	2773 91		1 90	25		

206			10 34		
10	2748 91		8 30	20 54	53 69
		10 72			
11	2782 06	133 70		144 42	
			1 75		
			10		
12	2637 64		10	21 75	
		31 78		58 38	
14	2615 89	26 60		38	
17	2519 51		10	35	
			30 10		
18	2484 51		8 02	48 12	
		30 57	10	45 32	
21	2436 39	14 75	4 07	14 07	37 44
			5		
			25		
23	2414 44		12	42	
				65 60	
24	2372 44	22 20	15 60	95 22	250
26	2461 62	73 02	50		
27	2461 62				
28	2461 62			32 31	
29	2429 31				
		3 50		49 81	
30	2429 31	10		13 50	
31	2366				212 97
Jan 1908				3 80	
1	2578 97	10 50		418 83	558 33
		75			
2	2714 67	333 33		558 33	
				5 25	
3	2156 34		2 25	95	
			3	170 63	
4	2056 09	100	81 34	117 75	
		17 75	30		
			50		
6	1767 71		9 29	26 87	1694 73

7	3435 57	25		175		207
8	3260 57	150		183 34	216 66	
9	3293 89			977		
10	2316 89	6 41		8 66		
11	2308 23	2 25	150	160		
13	2148 23	33 27	10	36 37		
14	2111 86	3 10				
15	2111 86			20		
16	2091 86		12	249 86	4800	
			200			
17	6642		20	25		
18	6617		17 86	34 61		
20	6582 39			50		
				2 75		
21	6532 39			128 75		
22	6400 89		73 05	83 05		
23	6317 84	10	10	22		
24	6295 84	12		2	238 15	
				10		
25	6531 99		5	31 23		
27	6490 76		5	238 15		
28	6252 61					
29	6252 61			50		
30	6202 61					
				3 50		
31	6202 61	75		188 32	365	
Feb		29 98				
1	6375 79	83 34				
				25		
3	6375 79			333 34	3300	
4	9317 45		30	766 25		
			736 25	787 66		
5	8551 20	113 41		34 75		

208		450					
6	7728 79	5 25		475			
		45					
		24					
7	7253 79	150	273	280 75			
			7 75	2501 76			
8	6973 04	2475 70		46 73	460		
10	4884 55	26 06	1 95	11 95	9041 66		
			10				
				189 41			
11	13914 26		50	100			
			133				
12	13624 85	332 50	6 41	843 69	120		
		37 86					
13	12901 16	275	50	237 75			
		198 33	25				
			42 75	100			
14	12663 41	330 80	120	405 80	1758 85		
		75		43 49			
15	13916 46		7	219 15			
17	13653 82	39 12	36 49	130 82	312 25		
		66 70					
18	13835 25	25					
19	13835 25			3	935		
20	14767 25			243 88	890		
				1245 85			
21	15413 37	29 50	1243 77	58 58			
		29 08	85				
24	14108 94	73 05	1 23	607 63	12261 17	6261 17	
		491 50				6000	Dis
25	25762 48	18 08		13 62	210		
		25		303 50			
26	25958 86			200	1950		
				291 65			
27	27405 36	3 50		45	122 20		

		7 77			119 20	209
28	27190 91	50	2	mem	5 48	3625
		50	5			
		78 38	11 50			
		102	5 55			
			14		16889 50	
29	30691 23	125	81 15		1228 04	
March		333 34	487			
2	12573 69	314	13490		330 83	905
		42 45	2912 50			
		30	196			
		383 25	83 33			
			4			
			47 50			
3	13147 86	32 50			46 50	
4	13101 36	14			111 17	
5	12990 19	109 25			559 25	
6	12430 94	450			90	
					5 72	
7	12340 94				33 16	
9	12302 06	150 35			152 25	
10	12149 81	1 90	25		35 66	
			10 66		990	
11	12114 15	105			30 35	816 66
		875				
12	11410 46	10			14 65	
13	11395 81	20 10			218 43	
		198 33			92 50	
14	11177 38				32 69	
16	11052 19				28 25	
17	11023 94					
18	11023 94	70 10			385 10	
19	10638 84	315	15		160	
20	10478 84		145		2 20	

210					
21	10476 64			27 91	
23	10448 73				
24	10448 73		95	100 75	233 50
25	10581 48		5 75	28 43	
26	10553 05			233 50	
27	10319 55				183
				2075	
28	10502 55	25		26 90	
30	8400 65	2050			
April 1					
	8400 65	333 34		433 34	197 50
		100			
2	8164 81	25		118 34	
		83 34		30	
3	8046 47	10		15	
				109 07	
4	8001 47	24 20		26 70	441 30
6	8307 00	2 50		10 20	
7	8296 80	6 40		25 59	
		1 25			
8	8271 21	17 94	12 50	483 80	
			441 30		
9	7787 41		30	1 75	
10	7785 66	10		24 50	
11	7761 16	14 50		29 55	
13	7731 61				
15	7731 61			50	
16	7681 61			27 50	
				3 50	
18	7654 11	2 25		34 86	50
24	7665 75	32 61		100	
25	7565 75			27 80	

27	7537 95			6 50	211
28	7531 45				
29	7531 45			95	
May					
1	7436 45	25		358 34	
		333 34		83 34	
2	7078 11	21 46		146 46	226 66
4	7074 97	125	30	2530 2 50	
	4542 47	108 79	2500	471 22	
		198 33		15	216 66
				3 17	
	4269 74	164 10			
	4269 74				
	4269 74			8 75	100
	4360 99			10 16 25 55	
11	4325 28			86 69	100
15	4338 59		25	154 10	129 75
16	4314 24		129 10	26 55	682
18	4969 69	198 33		290 83	37 50
		30			
19	4716 36	25	10	13 45	
19	4702 91	37 50	3 45		
	4702 91	100		741 90	
22	3961 01	641 90		9	
23	3952 01			66	
	3886 01	1 95		6 83	125
		4 88		2	
	4004 18			240	100
	3862 18				
	3862 18			20 38 05	

212					
June					
1	3823 93	23 10		146 43	
		83 33			
2	3677 50	40	28 50	446 17	
			4 83		
3	3231 33	106 83	79 50	121 83	
4	3100 50	15	333 34	11 75	
5	3097 75			1 77	180
				171	
6	3275 98	168 50		29 05	
8	3075 93	2 50		22 20	366 66
9	3420 39			9 66	170
10	3580 73			10	
11	3570 73			153 50	
				1227 71	
12	3417 23	10		15	
		198 33			
13	2174 52	2 25		23 10	
16	2151 42	1017 13		25	100
20	2226 42			45 84	
22	2180 58			105	
24	2075 58			268 29	
26	1807 29	100		137 22	
27	1670 07	37 22		25 60	
29	1644 47			10	
30	1644 37	120		254 45	50
July		134 45		180 72	
1	1439 92		97 38	15	250
2	1494 20	2 85	83 34	690 18	56
		333 33		105 17	
3	860 02	245	23 87	176 87	
		79	3	51 80	
6	577 98	30	150	1 10	50

			20		213
575 08			4 75		
550 33		150	157 20		
		3			
393 13		4 20	9 06		
384 07				125	
509 07			28 02		
481 05				247 91	
728 96	25		159 75		
	17 25				
569 21	117 50			70	
639 21			198 33		
440 88			36 05		
404 83	6		56		
348 83	50		3 75		
345 08	15 50		65 50		
279 58	50		50	1960 57	
2199 15			7 25		
			1058 55		
2182 90	15 20		27 95	237 18	
	965 75				
1333 58	77 60	6	6 45		
1327 13	11 82	45	211 82	50	
	200		443 80		
1165 31		250	36 15		
685 36		193 80	6		
679 36			2 85		
676 51			105 17		
571 34			187 38		
383 96			17 50	190	
556 46			153 70		
402 76			9 74		

214					
12	393 02	4		87 34	
14	305 68	83 34			2456 66
				9 31	
15	2762 34			27 10	4450
				508 34	
18	7175 93	150		25	
		300		4 90	
19	6642 59	33 34	30	2230	
21	4407 69	25	2200 mem	12 96	2616 09
22	7010 82	71 20		269 54	
		198 34		50	
25	6741 28		5 05	20 05	
26	6671 23		15		
27	6671 23			19 74	
28	6651 49			2 25	
29	6649 24	10		52 56	
		17 56			
31	6596 68	25	22 25	40 25	
Sept			18	2142 14	
1	6556 43	1808 80		65 26	
2	4349 03	333 34		67	
3	4282 03	83 34		211 51	
		23		2718 31	
4	4070 52	105 17	115	12 75	
			103 31	100	
5	1339 46		2500	21 10	500
8	1718 36			100	
9	1618 36	37 22		759 72	
		712 50			
10	858 64	10		311 14	
				17	
11	547 50			22 22	5400
12	5908 28			214 13	100
15	5794 15			2	

16	3794 15				8430	215
17	12224 15		10	277 66 34 25	216 66	
18	12128 90	2 50	24 25	47 42		
19	12081 48	6 63 9 35	28 08	53 08 22 50		
		28 94	25	682 04		
21	12005 90	20 d 10 47 75 250		327 75		
22	10996 11	182 04		182 04		
23	10814 07	500 112 46		310 80 15	2700	
24	13188 27	198 34	161 55	162 55		
26	13025 72		1	27 50	166 16	
28	13165 38	100		112 78		
29	13051 60	12 78		5 40		
30	13046 20			75		
Oct						
1	12971 20		500	833 34 2		
2	10137 86		333 34	83 33 11 10		
3	10043 43	105 17		217 67 26 54		
5	9799 22	112 50		33 80		
6	9765 42		150	258 82		
7	9506 60	1 40 72 98	108 82	174 38 250		
8	9082 22	100			6440 45	
9	15522 67			642		
10	15516 25			51 42		

216				38 13	
14	15464 83		25	2 55	17700
			13 13	64 87	
15	33124 15	5		2500	
		5 87		4523 17	
16	30559 28	3 30	17 50	267 50	200
		50 70	250	7468 70	
17	25968 61	20 72	4316 71	36 32	700
		7412 40	45 44		
19	19163 59	28 08	137 50	25 10	
		7 50	4 90		
20	19038 49		18 62	92 57	916 66
22	19862 58			5 20	
				198 33	
23	19857 38			500	
24	19159 05			19 77	
26	19139 28			15	
27	19124 28			97 40	50
28	19076 88			30	
29	19046 88			1 05	25 52 1
30	19071 35	75		109 37	1950
		34 37		422 68	
31	20911 98		333 34	113 50	
Nov. 2			83 34		
	20375 80		6		1998 75
4	22374 55	105 42		440 54	
		35 12			
5	21934 01	300		50	
6	21884 01			135	
				140	
7	21749 01			42 06	
9	21566 95	1		51	
10	21515 95	50		336 99	

11	21173 96	7 25		3101 71		217
13	18077 25	3091 11 3 35		239 240		
14	17598 25	27 95		280 95 177 95		
16	17139 35	150 150 130 95	25 2 50	27 50		
17	17111 85	592 50 d		599 15		
18	16512 70	6 65		7		
19	16505 70	7 50		16 50	144 50	
20	16633 70	9		7 50	216 66	
21	16842 86		247 75	1380 65 37 50		
23	15424 71	198	47 50 1085 40	324 71 14 05		
24	15085 95	28 08 98 63 D				
25	15085 95			100 10		
28	14975 95			2 23 39 60		
30	14934 12				122 13	92 94
Dec.			DEC.			
	15056 25	8		711 41 10 81		29 19 1
	14334 03	370 07 D 333 34	83 34	133 34		
	14200 69	148 13 d	50	656 40 135		
	13409 29	400 108 27	20	162 50 5 60		
	13241 19	125	100 42 50	3 25 171 60		

218		46 60			480 33	
7	13066 34	1 95		d	24 70	
		475		d	123 44	
8	12561 31	3 38			15	
10	12422 87				50	
					333	
11	12372 87				194 88	
					8 27	
12	11844 99				66 53	216 66
14	11986 85	568 52 d			644 52	
		76			223 68	
15	11342 33		198 68		30	
16	11088 65	5 45	25		37 45	
		30				
18	11051 20	2	32 14		387 14	
			324		110 92	
			31			
19	10664 06	104 92			180 13	
		6	25			
			52 50			
21	10373 01	27 50	102 62		30 10	
22	10342 91	2 60		d	247 04	
23	10095 87				500	
					50	
24	9595 87				125 31	60
26	9480 56			d	197 88	
28	9282 68			d	494 70	85
29	8872 98			d	469 66	
30	8403 32	20			93 08	19 1
		78 38				
31	8329 24	14 50			18 33	
					JAN	
Jan. 1909						
1	8310 91	73 05			556 39	
		333 34			116 34	
2	7754 52	100	155		189 50	

		50	54 50	263 87		219
			30			
4	7448 67	75	3	100		
		80	83 34			
5	7084 81	108 87			2966	
6	10050 81				5825	
7	15875 81	50		3 70		
8	15872 11	3 20		2 90	1625	
				2462 88		
9	17494 21	29 56		93 68	1550	
11	16487 65	64 12		420	1000	
12	17067 65		L	524 82	4125	
14	20667 83	6500		6510	1375	
		10		1602		
15	15532 83	125		145 02		
		20 02	d	494 54		
16	13785 81	1600	45	131	2950	
		2				
			86	12 36		
18	16110 27			25		
19	16072 91				1675	
20	17747 91	10		269		
		250		1967		
21	17478 91	9	250	6 30		
			1467	51 23		
22	15505 61	85 75	250	100 75		
		15				
23	15353 63	3 23		20	10884 15	
25	26217 78	48		23 60		
				824 67		
27	26194 18		10	25		
		d	73 10			
28	25344 51	54 45	741 57	187 57	932 12	908 59
		100		8089 51		23 53
29	26089 06	29 02	11 78	300		

220		4 10	103 53		
30	17699 55		905 55	15 54	

FEB

Feb.			550	846 25	
1	17684 01	25	66 60	237 50	405
		62 50	6452 05	464 10	
2	17005 26	150	13	135	98 50
		401 37	10		
		50	112		
		34 50	84 90		
		300	100		
		46 80	183 34		
		13 58	84 90		
3	16504 66	1 39	10 96	494 39	
		245			
4	16010 27	248	110 12	120 62	373 85
			10 50	4973 78	
5	16263 50	408 59 m		543 59	
		135			
	10746 13	4734 09			
		90 19			
		30			
		d 49 50			
		70			

EXHIBIT 15.

[Put in Evidence, page 120.]

COLLVER TOURS CO LETTERS OF CREDIT

	Balance		Checks	Deposits
1909				
May 12				9898 33 Dis
13	9898 33			4600
17	14498 33	d	2230 11	
20	12268 22	d	123 67	
22	12144 55	d	1222 18	

				13 40		221
25	10922 37	1261 90		1350 65		
26	9558 32	88 75	541 78	663 75		
			121 97	d 3240 52		
27	8894 57			50		
				120 75		
28	5604 05	1 33		277 33	13 66 1	
		9		915 50		
29	5219 63	4	173	124	1248 40	
		250 d	742 50			
		4				
		4				
		5				
June						
1	5428 53	30 75				
		90				

COLLVER TOURS GUARANTEE ACCT

1909						
July 1					1880	
2		1880				
Aug						
14	1880			1880		
15	0					

COLLVER TOURS CO LETTER OF CREDIT

1909						
Nov 24					15	
26	15000					
Dec						
6	15000			717 77		
8	14282 23				7	
11	21282 23		d	222 90		
14	21059 33		d	940 73		
18	20118 60		d	1683 17		
23	18435 43		d	990 02		
27	17445 41		d	148 60		
28	17296 81					

222

Jan 1910					
6	17296 81				1000
10	18296 81		d	1435 04	
12	16861 77		d	371 02	
18	16490 75		d	1579 78	
20	14910 97				1875
21	16785 97		d	1751 66	
25	15034 31		L	123 44	
29	14910 87		d	641 46	
	14269 41				
Feb. 1910					
2	14269 41		d	1479 37	
3	12790 04		d	739 21	
7	12050 83		d	1577 99	
8	10472 84				925
14	11397 84		d	1724 83	
15	9673 01		d	197 12	
19	9475 89		d	1857 89	
24	7618			295 50	
26	7322 50	123 12 d		492 49	
	6830 01	369 37			
March					
1	6830 01			147 84	
4	6682 17	246 40		1478 41	
		295 69			
7	5203 76	147 84		492 81	
		123 20			
8	4710 95	246 40		492 81	
		197 12			
	4218 14	147 84			
		24 64			
		49 28			
12	4218 14		d	1396 48	

5 2821 66		d 197 51		223
7 2624 15		d 987 51		
8 1636 64		d 1702 34		
1 65 70		d 592 11		
3 657 81			700	
5 42 19		d 616 80		
3 574 61		L 478 93		
9 1053 54			2000	
946 46		L 1357 81	1875	
1463 65				
pril 1910				
1463 65		d 691 68		
771 97		d 370 32		
401 65		d 825 62		
423 97		d 904 70		
1328 67			1700	
371 33		d 1384 34		
1013 01		d 395 51	900	
508 52		d 815 73		
1324 25		d 830 55		
2154 80		d 321 34	1500	
976 14			1500	
523 86		d 74 15		
449 71		d 741 57		
291 86				
y 1910				
291 86		d 395 75	3000	
2318 39		d 98 94		
2213 45		d 74 76		
2138 69		d 197 38		

1917

224					
19	1941 31		d	592 50	
20	1348 81		d	148 03	
28	1200 78		d	202 51	
	998 27				
June					
2	998 27		d	103 82	
4	894 45		d	247 35	
6	647 10		d	494 37	
9	152 73		d	98 81	
10	53 92		d	197 63	
11	143 71				1000
14	856 29		d	187 62	
17	668 67		d	49 34	
20	619 33		d	98 74	
25	520 59		d	493 44	
30	21 15		d	493 43	
July 1910					
2	466 28				500
7	33 72		d	123 20	1000
18	910 52		d	615 23	
	295 29				
Aug 1910					
2	295 29		d	49 19	
19	246 10			196 75	
	49 35				
Dec 1910					
2	49 35			49 35	

Accounts attached

225 *Docket Entries.*

Referee's Docket.

May 2, 1911. Petition of trustee to recover preferences vs. Boylston National Bank filed. Order of Notice issued returnable Monday, May 8, 1911.
6, Return of service filed.
8, Appearance of George F. Piper for Bolyston National Bank, respondent, filed.
13, Appearance of Hollis R. Bailey with G. F. Piper for Bolyston National Bank filed.
13, Respondent's answer filed.
16, Withdrawal of appearance of George F. Piper for Boylston National Bank, filed.
Dec. 15, Motion to amend petition, Studley, Trustee vs. Bolyston National Bank, filed and allowed.
Jan. 11, 1912. Respondent's Answer to new paragraph added by amendment to Petition filed.
Feb. 9. Motion to amend petition of trustee vs. Boylston National Bank, filed and allowed.
9, Trustee's brief filed.
12, Trustee's request for findings of fact re petition vs. Boylston National Bank filed.
15, Answer of respondent to trustee's amended petition filed.
15, Brief of respondent filed.
21, Decree entered denying trustee's petition vs. Boylston National Bank.
28. Petition of J. Butler Studley, Trustee, for review filed.
Mar. 4, Certificate by Referee to Judge, together with petition to recover preferences and amendments thereto. Subpœna, Answers of Respondent of May 13, 1911, Jan. 11, 1912 and Feb. 15, 1912,
226 Petitioner's Request for findings of fact, Brief for Trustee and Brief for Respondent, Order Dismissing petition, evidence and exhibits, filed with Clerk.

Clerk's Docket.

March 7, 1912. Certificate by Referee to Judge—Set down for hearing on March 11th.
11, Hearing continued one week by Order of Court.
18, Hearing—Decision reserved.
June 19, Opinion, Dodge, J.
19, Decree affirming order of Referee on certified question.
28, Petition for appeal and Assignment of Errors.
28, Appeal allowed, citation issued—Returnable July 27.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Boylston National Bank of Boston, a Corporation Organized under the Laws of the United States and Having its Usual Place of Business at Boston, in said District, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of July next, pursuant to an appeal duly obtaintd from a decree of the District Court of the United States for the District of Massachusetts, wherein J. Butler Studley, as he is trustee in bankruptcy of the Collver Tours Company, is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, this twenty-eighth day of June, in the year of our Lord one thousand nine hundred and twelve.

FREDERIC DODGE,
U. S. District Judge.

227 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *July* 5, 1912.

I hereby certify that on the fifth day of July, 1912, I served the within citation by giving in hand, at Boston, to Herbert B. Bailey, as he is assistant cashier of the within-named The Boylston National Bank, a true and attested copy of this precept.

GUY MURCHIE,
United States Marshal,
By JAMES C. RUHL, *Deputy.*

Fees.

Service	$2 00
Copy	30
Travel	06
	$2 36

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the original thereof on file in the clerk's office of said court in the cause in bankruptcy.

No. 16,686.

In the Matter of COLLVER TOURS COMPANY, Bankrupt.

And also the original citation issued upon the appeal of J. Butler Studley, trustee in bankruptcy of said Collver Tours Company, with the marshal's return of service thereof.

And I further certify that the petition for adjudication of bankruptcy in said matter was filed on the sixteenth day of December, 1910.

And I further certify that the adjudication of bankruptcy in said matter was made on the ninth day of January, 1911.

And I further certify that the total of the bankrupt's indebtedness, as shown by the summary annexed to its schedules, is $48,935.88.

228 In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this seventh day of August, A. D. 1912.

[SEAL.] CHARLES K. DARLING, *Clerk.*

Order of Enlargement of Time for Docketing Case and Filing Record.

July 27, 1912.

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the clerk of this court be enlarged to and including Monday, August 26, 1912.

FREDERIC DODGE,
District Judge.

229 & 230 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,
v.
THE BOYLSTON NATIONAL BANK, Respondent, Appellee.

Appellee's Motion to Dismiss for Want of Jurisdiction.

(Filed October 10, 1912.)

And now comes the appellee, the Boylston National Bank, and moves that the appeal be dismissed for want of jurisdiction, inasmuch as the decree appealed from is not a final decree.

The grounds for this motion are more fully stated in the accompanying brief.

THE BOYLSTON NATIONAL BANK,
Appellee,
By HOLLIS R. BAILEY, *Its Solicitor.*

231 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,
v.
THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

Appeal from the District Court of the United States for the District of Massachusetts.

Before Colt, Putnam, and Brown, JJ.

Opinion of the Court.

November 21, 1912.

PUTNAM, *J.*:

The proponent of this proceeding is the trustee in bankruptcy of the Collver Tours Company. The respondent is a bank of deposit where the bankrupt kept an ordinary bank account, borrowing money from it, and keeping deposits there, from 1907 to the time the bankruptcy petition was filed on December 16, 1910. Borrowings and deposits ran along in the customary way, with nothing occurring out of the common course unless as herein stated. The trustee, claiming that what occurred constituted a preference, filed in the District Court a petition to recover from the bank certain sums received by it, which petition was dismissed by the District Court in bankruptcy, whereupon the trustee took this appeal.

The appellee, that is, the bank, first filed a petition for dismissal of this appeal on the ground that there had been no final decree; but the order in the District Court dismissing the petition
232 contained all the elements of a final decree, and was in such form as has been customarily accepted as such in bankruptcy proceedings.

The most convenient way of stating the facts is to recite them as they appear in the opinion of the learned judge of the District Court, which, although not strictly a part of the record, so far as we cite it is fully supported by the proofs. We will observe, however, that the word "payments" as used in the citation we make covers proceedings by off-set as well as payments according to the usual use of the word. The opinion states as follows:

"The payments to this bank which the trustee seeks to recover back as preferences voidable under section 60*b* of the Bankruptcy Act were on September 12, 20 and 30, October 3 and 14, 1910. The payments were of $5000 each, except that of October 3, which was of $2500. Adjudication was on January 9, 1911, under an involuntary petition filed December 16, 1910, the act of bankruptcy charged being a general assignment by the bankrupt on December 9, 1910.

"Each of the payments was from funds which had been from time to time deposited by the bankrupt to its own credit, and subject to its own checks, in a deposit account which it had maintained with the bank since 1906. Each payment was of a note which had previously been given to the bank by the bankrupt and which fell due at the time of the payment. The payments of September 12, 20 and 30 were each made by the bankrupt's check upon the deposit account referred to, given at the time by it to the bank for the purpose. In the case of the payments on October 3 and 14 the bank itself charged up the amount due on the note against the deposit account without asking the bankrupt's consent, but with its acquiescence, thus paying itself the amount due on the note without the use of any check to effect the payment."

We cite further from the opinion of the learned judge of the District Court to show the nature of the deposit account in question:

"In June, 1907, the bank discounted two notes of $2000 each for the bankrupt, which were paid from its deposit account in October, 1907. In February, 1908, it had discounted three notes amounting in all to $6500, which were paid in like manner in September and October, 1908. In 1909, under an agreement to give the bankrupt a 'line of discount' amounting to $25,000, it discounted notes
233 amounting to $15,000 in April, $10,000 in May, $10,000 in July and $500 in September. Of these notes $25,000 in all were renewed during the year as they became due, and $10,500 in all were paid. Beginning with May 12, 1909, the total amount of these notes outstanding during the remainder of the year was at no time less than $25,000, and for a time in September, 1909, it stood at $25,000. Under a similar agreement, new notes amounting to $25,000 in all were discounted during 1910 at various times up to and including August 4, notes to the same amount were renewed at various times to and including September 6, and notes to the same amount were paid from the deposit account at various times up to and including July 22; the total amount of notes outstanding being $25,000 in February, 1910, rising to a maximum of $30,000 in April, falling to a minimum of $10,000 on June 20, and standing at $25,000 between August 4 and September 6, inclusive. The successive payments claimed to be preferences reduced this amount after September 6 from $25,000 to $2500, there being one note for that amount, given October 3, 1910, outstanding after the payment of October 14. Exhibit 2, presenting in detail the dates and amounts of all the discounts, renewals and payments during the entire period from June, 1907, to and including October 14, 1910, may be referred to.

"The deposit account above referred to began in 1906 and was continued up to December 2, 1910, a week before the general assignment mentioned, when it was closed on the books of the bank. It was at all times a regular general deposit account, subject to check by the bankrupt in ordinary course. Its state from day to day during the time of its continuance is shown by transcripts from the bank's books (Exhibits 13 and 14), and is below referred to."

It thus appears that the account was of a fluctuating character, as

might be expected from the nature of the business of the bankrupt corporation, which was that of conducting tours, some of them around the world, a business which is generally done more on credit, by anticipating the future, or on established good-will, than on the amount of fixed capital or permanent assets.

Nevertheless, the circumstances are such that, under the amendatory Bankruptcy Act of June 25, 1910, the rule of this court in Hardy v. Gray, 144 Fed. Rep. 922, might not apply except for the peculiar circumstances relating to all bank accounts kept in
234 good faith, and the decisions in New York National Bank v. Massey, 192 U. S. 138 (January 4, 1904), and Lowell v. International Trust Company, 158 Fed. Rep. 781, decided by this court on December 17, 1907.

The circumstances in this case may not be in all particulars the same as in the cases cited; but the cases cited make such broad distinctions with reference to going bank transactions that the principles enunciated reach the appeal at bar. Those decisions seem to have regard to the necessities of public interests. These require that banks of deposit and discount should not be held to rules so strict as to embarrass, so far as it can be avoided, their transactions with the localities in which they are situated. And especially regard must be had to circumstances such as exhibited here, where credit is necessarily given, not merely on the faith of existing assets, but on the expectation of the results of hopeful enterprises, characteristics which may necessarily be involved in any long-continued enterprises such as those relating to world-round tours.

Of course, to be within the rule of the cases cited good faith must exist, and there must be no deposits made after insolvency threatens, wholly or especially for the purpose of enabling a bank to secure an advantage over other creditors. In this case it is plain there was no such intention; and it is also plain that the deposits were honestly made, so that, within the somewhat artificial rule in Bank v. Massey, as stated in the opinion of Mr. Justice Day in behalf of the court, at page 147, "a deposit of money to one's credit in a bank does not operate to diminish the assets of the depositor." It being the fact that the deposits were honestly made, and as also the Bankruptcy statutes go beyond the common law, which allows set-off of all debts overdue, in that they also allow set-off of everything due and not due, when brought down to "present value" so far as the interest account is concerned, it follows that in the present case, as stated in Lowell v. International Trust Company, at page 784, what the bank did was simply to give form to what the law itself would accomplish in substance. We will repeat here what we said there, namely:

"What the International Trust Company did in the case at bar more than what was done in New York Bank v. Massey was,
235 as we have said, simply to give form to what the law itself accomplished in substance. Moreover, if what was done by the International Trust Company in distinction from what was done by the creditor in New York Bank v. Massey, accomplished a preference, and for that reason was invalid or has been invalidated, the condition prior to the charging up the demand loans would have

been restored by force of law, and the deposit would remain with the International Trust Company, precisely as it did in the case before the Supreme Court, and also the law would be left to operate in precisely the same manner. All this, therefore, raises no substantial difference which we can discover to relieve us from the conclusions of the Supreme Court in the case on which the International Trust Company relies."

In applying these broad principles, whether the depositor gave checks against his deposits for notes as they came due or notes which were overdue, or the bank delayed all proceedings until the petition in bankruptcy was filed, and thus evidenced a statutory set-off, was purely a matter of form; and it follows that the decision of the District Court was correct.

The decree of the District Court is affirmed: and the appellee recovers its costs of appeal.

236 United States Circuit Court of Appeals for the First Circuit. October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,

v.

THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

Final Decree.

NOVEMBER 21, 1912.

This cause came on to be heard October 10, 1912, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, November 21, 1912, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed; and the appellee recovers its costs of appeal.

By the Court,

FRANCIS M. FOGARTY, *Clerk.*

237 & 238 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,

v.

THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

Claim of Appeal.

(Filed in Circuit Court of Appeals and Allowed December 16, 1912.)

J. Butler Studley, as he is Trustee in Bankruptcy of The Collyers Tours Company, being aggrieved by the decree made and entered herein on or about November 21, 1912. affirming the decree of the

District Court and ordering that the appellee recover his costs of appeal, does hereby appeal from such decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which he has filed herewith, and prays that this appeal may be allowed and that a duly authenticated transcript of the record, proceedings and papers on which said decree was made may be sent to the said Supreme Court of the United States.

BRANDEIS, DUNBAR & NUTTER,
Attorneys for J. Butler Studley, as He is Trustee in Bankruptcy of The Collvers Tours Company.

The foregoing claim of appeal is allowed.

LE BARON B. COLT,
One of the Judges of the United States Circuit Court of Appeals for the First Circuit.

239 & 240 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,
v.
THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

In the Matter of the Appeal of J. BUTLER STUDLEY, Trustee, to the Supreme Court of the United States.

Assignment of Errors.

(Filed in Circuit Court of Appeals December 16, 1912.)

J. Butler Studley, as he is trustee of the estate in bankruptcy of The Collvers Tours Company, says that in the record and proceedings of the said Circuit Court of Appeals of the United States for the First Circuit in the above matter and in the final order or decree made and entered therein on November 21, 1912, there is manifest error, and for causes thereof the said trustee assigns that the court erred in the following:

1. The court approved and affirmed the order of the District Court for the District of Massachusetts dismissing the petition of the said trustee against the Boylston National Bank to recover preferences.

2. The court denied the petition of the said trustee that the decree entered by the said District Court on June 19, 1912, dismissing the said trustee's petition against said Boylston National Bank be reversed.

3. In not decreeing that the payment, transfer or set off of $5000 to the Boylston National Bank of September 12, 1910, was a preference within the Act of the Congress of the United States, approved July 1, 1898, entitled "An Act to Create a Uniform System of Bankrutpcy in the United States and Territories," and
241 & 242 the amendments thereof, which the Trustee had a right to recover, and in not directing that the decree of said

District Court of June 19, 1912, should be reversed so far as it related to this payment.

4. In not decreeing that the payment, transfer or set off of $5000 to the Boylston National Bank of September 20, 1910, was a preference within the said Act of Congress approved July 1, 1898, which the trustee had a right to recover, and in not directing that the decree of said District Court of June 19, 1912, should be reversed so far as it related to this payment.

5. In not decreeing that the payment, transfer or set off of $5000 to the Boylston National Bank of September 30, 1910, was a preference within the said Act of Congress approved July 1, 1898, which the trustee had a right to recover, and in not directing that the decree of said District Court of June 19, 1912, should be reversed so far as it related to this payment.

6. In not decreeing that the payment, transfer of set off of $2500 to the Boylston National Bank of October 3, 1910, was a preference within the said Act of Congress approved July 1, 1898, which the trustee had a right to recover, and in not directing that the decree of said District Court of June 19, 1912, should be reversed so far as it related to this payment.

7. In not decreeing that the payment, transfer or set off of $5000 to the Boylston National Bank of October 21, 1910, was a preference within the said Act of Congress approved July 1, 1898, which the trustee had a right to recover, and in not directing that the decree of said District Court of June 19, 1912, should be reversed so far as it related to this payment.

8. The court ruled as a matter of law that the appellant was not entitled to recover any of the payments, transfers or set offs in question.

9. The court ruled as a matter of law that the payments in question were not to be regarded as "transfers" within the meaning of Section 60*b* of the Bankruptcy Act of 1898 as amended in June, 1910.

10. The court ruled as a matter of law that Section 68*a* of the Bankruptcy Act of 1898 was applicable to set offs made prior to the filing of a Bankruptcy petition.

243 & 244 11. The court ruled as a matter of law that Section 68*a* of the Bankruptcy Act of 1898 was applicable to set offs made by the Boylston National Bank on its claim against The Collver Tours Company more than two months before any bankruptcy petition was filed against The Collver Tours Company.

12. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on September 12, 1910, was a set off within Section 68*a* of the Bankruptcy Act of 1898.

13. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on September 20, 1910, was a set off within Section 68*a* of the Bankruptcy Act of 1898.

14. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on

September 30, 1910, was a set off within Section 68*a* of the Bankruptcy Act of 1898.

15. The court held that the transaction by which $2500 was paid to the Bolyston National Bank by The Collver Tours Company on October 3, 1910, was a set off within Section 68*a* of the Bankruptcy Act of 1898.

16. The court held that the transaction by which $5000 was paid to the Boylston National Bank by The Collver Tours Company on October 21, 1910, was a set off within Section 68*a* of the Bankruptcy Act of 1898.

Wherefore the said trustee prays that the said decree of the United States Circuit Court of Appeals for the First Circuit, dated November 21, 1912, may be reversed, and that the Circuit Court of Appeals may be directed to enter a decree that the transfers by The Collver Tours Company of $5000 on September 12, 1910, $5000 on September 20, 1910, $5000 on September 30, 1910, $2500 on October 3, 1910, and $5000 on October 21, 1910, were each preferences that may be avoided by the trustee in these proceedings, and that the Boylston National Bank be ordered to repay each of said sums to the trustee with interest thereon from the date of payment of each sum, and costs.

By His Attorneys, BRANDEIS, DUNBAR & NUTTER.

245 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Boylston National Bank of Boston, a corporation organized under the laws of the United States and having its usual place of business at Boston in the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the* fourteenth day of January next, pursuant to an Appeal duly obtained from a decree of the† United States Circuit Court of Appeals for the First Circuit, wherein J. Butler Studley, as he is trustee in bankruptcy of the Collver Tours Company, — appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit this sixteenth day of December, in the year of our Lord one thousand nine hundred and twelve.

LE BARON B. COLT,
Senior Circuit Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

246 [Endorsed:] Marshal's No. 9358. U. S. Marshal's Office, P. O. Building, Boston, Mass., Dec. 18, 1912.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *December 18th,* 1912.

I hereby certify that on the Eighteenth day of December, 1912, I served the within citation by giving in hand to Edward A. Church, Cashier, and in charge of the business of the within-named Boylston National Bank, at 41 Bedford Street Boston, in said District, a true and attested copy of this citation.

GUY MURCHIE,
United States Marshal,
By DONALD CAMERON, *Deputy.*

Fees.

Service	$2.00
Copy	.30
Travel	.06
	$2.36

247 United States Circuit Court of Appeals for the First Circuit, October Term, 1912.

No. 991.

J. BUTLER STUDLEY, Trustee, Petitioner, Appellant,
v.
THE BOYLSTON NATIONAL BANK OF BOSTON, Respondent, Appellee.

Clerk's Certificate.

I, Francis M. Fogarty, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court of Appeals in the cause entitled, No. 991, J. Butler Studley, Trustee, Petitioner, Appellant, v. The Boylston National Bank of Boston, Respondent, Appellee, in said Circuit Court of Appeals determined, the Petition for Appeal, the Assignment of Errors, and also the original Citation issued upon the appeal of J. Butler Studley, Trustee, Petitioner, Appellant, in said cause with service endorsed thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit the nineteenth day of December, A. D. 1912.

[Seal United States Circuit Court, of Appeals, First Circuit.]

FRANCIS M. FOGRATY, *Clerk.*

Endorsed on cover: File No. 23,474. U. S. Circuit Court Appeals, 1st Circuit. Term No. 899. J. Butler Studley, trustee in bankruptcy of The Collver Tours Company, appellant, vs. The Boylston National Bank of Boston. Filed December 28, 1912. File No. 23,474.

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Supreme Court of the United States

OCTOBER TERM, 1912, No. 899.

J. BUTLER STUDLEY, TRUSTEE IN BANKRUPTCY OF THE COLLVER TOURS COMPANY,
APPELLANT,

vs.

THE BOYLSTON NATIONAL BANK OF BOSTON,
APPELLEE.

BRIEF FOR THE APPELLANT.

STATEMENT OF CASE.

This is a petition by J. Butler Studley as Trustee of the estate in bankruptcy of the Collver Tours Company to recover preferential payments made by the Collver Tours Company to the Boylston National Bank.

The bankruptcy proceedings were begun by a creditors' petition filed against the Collver Tours Company on December 16, 1910, and said Studley was appointed Trustee on January 24, 1911. The bankrupt's schedules showed assets of $2442.80 and liabilities of $48,935.88.

The present suit was begun by a plenary petition filed with the Referee in Bankruptcy for Suffolk County in the District of Massachusetts on May 2, 1911, seeking to

recover the following amounts received by the Boylston National Bank from the Collver Tours Company:

September 6, 1910,	$5,000
September 12, 1910,	5,000
September 20, 1910,	5,000
September 30, 1910	5,000
October 3, 1910,	2,500
October 14, 1910,	5,000

The transaction of September 6, 1910, was a renewal of a note and the Trustee does not now contend that he is entitled to recover the $5,000 paid on the old note on September 6, 1910.

The Boylston National Bank is a national bank doing business in Boston, with which Bank the Collver Tours Company had an ordinary deposit account subject to check. On September 6, 1910, the Collver Tours Company was indebted to the Boylston Bank in the sum of $25,000 for moneys loaned on five notes for $5,000 each. On the date of each of the payments in question one of these notes then held by the Bank became due and was paid out of the moneys then on deposit to the credit of the Collver Tours Company at the Boylston Bank. The $5,000 note falling due on October 3, 1910, was not paid in full, $2,500 being paid on that day and a new note for $2,500 given.

The payments of September 12, September 20 and September 30, 1910, were made by checks drawn by the Collver Tours Company to the order of the Boylston Bank against the deposit account of the Collver Company at the Bank. The payments of October 3 and October 14, 1910, were made by the application by the Bank of

funds of the Collver Tours Company then on deposit to the credit of the Collver Tours Company at the Bank, no checks being given.

Substantially all the facts thus far stated are expressly admitted by the Boylston National Bank in its answer (Rec. 8-12), and it is also expressly admitted that (Rec. 12) "the result of the several transactions occurring between September 8 and October 14 was that the indebtedness of the Collver Tours Company to the (Boylston Bank) was reduced from approximately $25,000 to approximately $2,500."

The moneys out of which the payments were made were all deposited by the Collver Company with the Bank after September 6, 1910 (Rec. 56 and 75).

The Boylston Bank in its answer (Rec. 8) neither admitted nor denied the allegation in the petition that the Collver Company was insolvent at all times after August 1, 1910, and for a long time prior thereto, but the Bank has not contended in any of the courts below that the Collver Tours Company was not insolvent at all times after August 1, 1910.

The defences claimed by the Bank were that it had no reasonable cause to believe that the payments to it would effect preferences, and that it had a valid lien upon the sums deposited with it and had a right of setoff both at common law and under the Bankruptcy Act, by which it was entitled to apply in payment of any debts due to it from the Collver Tours Company any amounts due from the Boylston Bank to the Collver Tours Company on its deposit account.

The only fact as to which there was any substantial dispute was whether the Bank had reasonable cause to

believe that the payments or transfers in question would effect preferences.

The pleadings were completed before the Referee, any possible objections to the jurisdiction of the Referee being expressly waived (Rec. 35) and a trial was had before the Referee at which both parties offered evidence. All the testimony and exhibits appear in the record (Rec. 34-188). On February 21, 1912, the Referee made an order denying the petition (Rec. 14) and the Trustee, on February 28, 1912, duly petitioned for a review by the District Judge (Rec. 14).

On March 2, 1912, the Referee made a certificate, filed March 7, 1912 (Rec. 15), of the facts found by him. The Referee expressly left open the question whether the Bank had a right of setoff (Rec. 18) and denied the petition because he "arrived at the conclusion that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the Bank amounted to preferences." (Rec. 19.)

A record embodying all the evidence was certified to the District Judge by the Referee (Rec. 19) and the case was then heard before the District Court (Frederic Dodge, J.) and on June 19, 1912, he ordered that the Referee's order dismissing the Trustee's petition be affirmed (Rec. 19).

The District Judge, after careful consideration, concluded (Opinion of District Judge, Rec. 22, 23) that (Rec. 23) "the evidence requires the conclusion that the bankrupt's admitted insolvency would have been ascertained by due use of that right to investigate the company's affairs, and that opportunity for such investigation which belonged to the Bank by virtue of the fact that the company was a depositor to whom it was granting large credit."

The District Judge, however, felt that he was required to agree with the Referee's final result because he was bound by a decision of the Circuit Court of Appeals for the First Circuit, *Lowell* v. *International Trust Company*, 158 Fed. 781 (C. C. A. 1st, 1907), and that under that decision the Bank was entitled to retain the payments in question as setoffs within section 68*a* of the Bankruptcy Act of 1898, although the payments were made more than two months before the bankruptcy (Rec. 21, 22). It seems clear that Judge Dodge would not have reached this conclusion had he not felt himself bound by the case of *Lowell* v. *International Trust Company*.

On June 28, 1912, the Trustee appealed from the order of the District Court of June 19, 1912, to the Circuit Court of Appeals for the First Circuit (Rec. 24), and on November 21, 1912, the Circuit Court of Appeals affirmed the order of the District Court (Rec. 195). There is nothing in the Opinion of the Circuit Court of Appeals (Rec. 192, 195) to indicate that the Circuit Court of Appeals did not concur with the view of the facts stated by Judge Dodge in his Opinion in the District Court. The principal, if not the sole, ground of the Opinion of the Circuit Court of Appeals was that under the decisions of *New York County Bank* v. *Massey*, 192 U. S. 138 (1904) and *Lowell* v. *International Trust Company*, 158 Fed. 781 (C. C. A. 1st, 1907), the Bank was entitled to setoff, although the transactions took place more than two months prior to the bankruptcy.

From the decree of the Circuit Court of Appeals of 1912 the Trustee, on December 16, 1912, appealed to this Court (Rec. 195), the cause being one in which, under sec-

tion 24*a* of the Bankruptcy Act of 1898, a direct appeal lies from the Circuit Court of Appeals to the Supreme Court.

Newport Bank v. *Herkimer Bank*, 225 U. S. 178 (1912)
Cf. *Eau Clair Nat'l Bank* v. *Jackman*, 204 U. S. 522 (1907).
Rector v. *City Deposit Bank*, 200 U. S. 405 (1906).

The cause was transferred to the summary docket on motion of the appellee, consented to by the appellant. It is believed the motion to affirm was made for the purpose of having the cause advanced.

ERRORS RELIED UPON.

The appellant claims that the decree of the Circuit Court of Appeals of November 21, 1912, affirming the decree of the District Court, was erroneous because:

A. Each payment in question was a preference which the Trustee in Bankruptcy was entitled to avoid (assignments of error Nos. 1-8 inclusive, Rec. 196, 197).

B. The setoff provisions of the Bankruptcy Act of 1898 — section 68*a* — were not applicable to the transactions in question (assignments of error Nos. 9-16 inclusive) and that,

C. The decision of the court below should be reversed.

ARGUMENT.

A.

EVERY ELEMENT OF A VOIDABLE PREFERENCE WAS PRESENT IN EACH PAYMENT.

1.

The Amendment of 1910.

Prior to June 25, 1910, the Bankruptcy Act of 1898 provided, section 60*b*, that a preference was voidable by the Trustee if "the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference."

By the amendatory Act of June 25, 1910, section 11, section 60*b* of the Act of 1898 was amended in this respect so as to provide that "if a bankrupt shall have . . . made a transfer of any of his property, and if at the time of the transfer . . . and being within four months before the filing of the petition in bankruptcy . . . the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the Trustee. . . ."

The principal effect of the amendment is the abolition of the requirement that the creditor receiving the preference "shall have had reasonable cause to believe that it was intended thereby to give a preference." Under the amendment the creditor need have no belief or reasonable cause to believe anything as to the intention of the debtor. All that the Trustee need prove is that a transfer has been made, that the bankrupt was then insolvent, that the transfer operated as a preference, and that the person

receiving it or to be benefited thereby had reasonable cause to believe that the transfer would effect a preference.

2.

The proof necessary to avoid a preference under the amendment of 1910.

This Court has not considered the *quantum* of proof necessary to avoid a preference under this amendment of 1910. The case at bar is in this respect one of first impression. It seems clear that no more can be required than that the Trustee prove that at the time of the transfer the creditor knew that the debtor was insolvent. As Mr. Justice White said in *Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502, at 508, 509 (1905):

> "If Harrison (the bankrupt), being insolvent to the knowledge of the Company (creditor), within the prohibited period, gave to the (creditor) authority to collect the sums due . . . with the right, or even the option, to apply the money to a prior debt due by Harrison to the Company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did."

Or, as the late Judge Lowell said in the case of *Re Andrews*, 135 Fed. 599 (1905):

> "If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe that a preference is intended."

So, if a debtor is insolvent when he pays a pre-existing debt, the inevitable result of the payment is to create a preference, and if the creditor receiving the payment has knowledge of the debtor's insolvency, the law must conclusively impute to the creditor knowledge of the inevitable preferential effect of the payment.

In the only case that has been found that discusses the *quantum* of proof necessary to avoid a preference under the amendment of 1910 it has been suggested that under the amendment the Trustee certainly need not go further than to prove knowledge of the debtor's insolvency.

Ogden v. *Reddish*, 200 Fed. 977, at 979 and 988 (1912).

The statutory requirement is not actual belief but only "reasonable cause to believe." "Reasonable cause to believe . . . does not require proof that the defendant had either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended."

Sundheim v. *Ridge Ave. National Bank*, 138 Fed. 951, 953 (1905).
Remington, Bankruptcy, secs. 1399, 1410.

Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.

Coder v. *McPherson*, 152 Fed. 951, 953 (1907).
Wright v. *Skinner Mfg. Co.*, 162 Fed. 315, 317 (1908).
Tilt v. *Citizens Trust Co.*, 191 Fed. 441, 447 (1911).

Crandall v. *Coats*, 133 Fed. 965, 969 (1905).
Hamilton National Bank v. *Balcomb*, 177 Fed. 155, 158 (1910).
Ernst v. *Mechanics' & Metals National Bank*, 200 Fed. 295, 298 (1911).

A short examination of the facts will show that the Collver Company was insolvent at the time of all the payments in question, that the effect of each payment was a preference to the Boylston National Bank, and that the Bank either knew or had reasonable cause to believe that the effect of each payment would result in a preference to the Boylston Bank.

3.

The Bankrupt, the Collver Tours Company, was insolvent at the time of each transfer.

The insolvency of the bankrupt at the time of each transfer is virtually conceded, for although not formally admitted, the Bank averred in its answer (Rec. 8) that it could "neither admit nor deny the same." The District Judge in his Opinion (Rec. 23) referred to "the bankrupt's admitted insolvency." The evidence of the insolvency of the bankrupt at all times for at least eleven months prior to the bankruptcy was overwhelming.

The bankrupt's certificate of condition, a public record, filed with the Massachusetts Commissioner of Corporations, on March 31, 1910, showed that as of December 31, 1909, the Collver Tours Company had a deficit of $44,896.65 (Rec. 41). A statement was prepared by the officers of the Collver Tours Company in April, 1910, showing this deficit of $44,896.65 as of December, 1909, and showing upon its face that the assets of the corporation were not equal to its liabilities, excluding the capital

stock from these liabilities (Rec. 45, 118). The bankrupt's schedules showed that as of December 16, 1910, the assets of the corporation were only $2,442.80 and its liabilities $48,935.88.

There is nothing to indicate that the condition of the corporation at any time after December 31, 1909, was any better than it was at that date.

4.

The Boylston Bank knew, or is chargeable with knowledge of, the insolvency of the Collver Tours Company at the time of each transfer.

Whether the Bank knew or was chargeable with knowledge of the admitted insolvency of the Collver Company was really the only fact in issue in any of the courts below. The Referee was of the opinion that the Bank had only occasion to be suspicious (Rec. 18), but the District Judge, after fullest consideration, was of the opinion that (Rec. 23) "the evidence requires the conclusion that the bankrupt's admitted insolvency would have been ascertained by due use of that right to investigate the company's affairs and that opportunity for such investigation which belonged to the Bank by virtue of the fact that the company was a depositor to whom it was granting large credit," and that "the facts shown to have been within its knowledge seem . . . such as to put it (the Bank) upon inquiry."

The evidence to this effect was clear and conclusive. The bankrupt's certificate of condition filed with the Massachusetts Commissioner of Corporations and, as before pointed out, a public record, showed as of December 31, 1909, a deficit of $44,896.65 (Rec. 42) and that the assets of the company, taking these assets at the valuations placed upon them by the officers of the company,

were approximately $4,000 less than the liabilities of the company, exclusive of capital stock (Rec. 114). This certificate was filed with the Massachusetts Commissioner of Corporations on March 31, 1910 (Rec. 116). A copy, or a summary of it, came to the attention of one of the officers of the Bank in charge of the transactions between the Bank and the Collver Tours Company sometime in the summer of 1910 (Rec. 86).

On April 13, 1910, the Collver Company submitted to the officers of the Bank a memorandum (Rec. 45, Exs. 3 & 4, Rec. 118) showing on its face a deficit of $44,896.65, and showing that the liabilities of the corporation, exclusive of capital stock, exceeded the assets at the value placed upon the assets by the officers of the Collver Company. Although the Referee in his certificate says that statements of this character "in view of the new definition of insolvency contained in section 1 of the Act are not so material as formerly, when the rule was that a debtor was insolvent if he could not immediately cash his liabilities when presented," it is respectfully submitted that nothing can be more material or convincing as indicating knowledge by a creditor of the insolvency of his debtor than statements of assets and liabilities prepared by the debtor himself as to his own condition and submitted, the one as a public record, the other to a bank with which the debtor was having large dealings, both statements showing on their face insolvency within the statutory definition and both coming to the creditor's attention. If such statements do not amount to notice, it is difficult to conceive what evidence would constitute notice. The slightest inquiry would have shown the Bank that the assets of the Collver

Company were worth much less than the estimates of the Company's officers.

There is nothing to indicate that the condition of the corporation was at any time after April, 1910, any better than it was in April, 1910, and in December, 1910. At the time of bankruptcy the condition was obviously much worse than it was in April, 1910, according to the statements of the bankrupt's officials, and after April, 1910, the Bank had much more notice of the actual condition of the Collver Tours Company. On April 13, 1910, the Collver Company was indebted to the Boylston Bank in the sum of $30,000 (see schedule, Rec. 117). What followed thereafter is well summarized by Judge Dodge in the Opinion of the District Court (Rec. 23, 24).

"To the bank's knowledge, the anticipated profits from the summer tourist season of 1910 were being relied on as the source from which the $30,000 loan was to be repaid. As the season advanced and before September 12, when the first payment in question was made, it had come to the bank's knowledge that these anticipations could not be realized. Although the indebtedness of $30,000 existing in April was reduced to $10,000 by June 20, it stood again at $25,000 on August 4 by reason of loans of $5000 on July 7, $5000 on July 14 and $10,000 on August 4, less a payment of $5000 on July 22. At $25,000 it stood until the first of the payments in question on September 12,— three renewal notes of $5000 each being given meanwhile upon the maturity of earlier notes on August 16 and September 6. It was the failure of the profits anticipated from the summer business which compelled the bankrupt to renew instead of paying the three notes last mentioned, and of this fact the bank had knowledge. Late in August or the early part of September an urgent request for a loan of $5000 in addition to the $25,000 outstanding was refused. The renewal on September 6 was because $2800 stood only to the bankrupt's credit in the deposit account and it had no other

funds available. The daily balances to its credit after September 6 became much more frequently small or insignificant in amount, and funds deposited after that date consisted, as the bank knew, mainly of advance payments made to the company upon contracts which it would have to perform and of which the ultimate returns would be long delayed. The payment received by the bank October 3 was partial payment of a note for $5000 which the company could not meet in full and which it was forced to renew for $2500."

5.

This Court should follow the findings of fact made by the District Court.

The general rule is clear that findings of fact of the District Court cannot be disturbed by the Circuit Court of Appeals or by the Supreme Court upon appeal, "unless the proposition is clearly and unmistakably established that the finding in the tribunals below is erroneous. . . . It is a familiar rule in equity that an appellate court will not interfere with findings of fact under such circumstances as appear here, unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of evidence."

In re Noyes Brothers, 127 Fed. 286, 287 (C. C. A. 1st, 1903).
In re Dorr, 196 Fed. 292, 294 (C. C. A. 9th, 1912).

It appears from the elaborate Opinion of Judge Dodge (Rec. 19, 24) that he examined the facts with the greatest care, and his conclusions ought to be followed.

There is nothing in the Opinion of the Circuit Court of Appeals (Rec. 192, 195) to indicate that the Circuit Court of Appeals disagreed with any of the conclusions of Judge Dodge as stated in his Opinion — and the Opinion of Judge Dodge, it is clear, states the facts correctly.

The Boylston Bank will doubtless claim that the Opinion of the District Judge is not a part of the record and does not take the place of findings of fact, and that this Court should be bound by the conclusions of the Referee, which are in the form of findings of fact.

A similar contention was disposed of by the Circuit Court of Appeals for the First Circuit in the case of *In re Pettingill & Co.*, 137 Fed. 840, 842 (1905), in a paragraph that conclusively answers the contentions now made:

> "The fundamental difficulty about these propositions is that, under section 24b of the act of July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the proceedings of the District Court are before us, and not the proceedings of the referee. Although in a loose sense parties who are dissatisfied with the conclusions of the referee are said to appeal to the District Court, yet the action of that court on the findings of the referee did not assume the formalities of an appellate tribunal. Neither, according to the usual practice, are the proceedings before the referee brought before the court on exceptions, and thus made a part of the record, as in the case of a master in chancery. The relations between the court and the referee are usually of an informal character. Section 38 of the act of July 1, 1898, c. 541, 30 Stat. 555 (U. S. Comp. St. 1901, p. 3435), and general order 27 (89 Fed. xi; 32 C. C. A. xxvii), provide for review by the court of the orders of referees in the most general terms, and are far from limiting the court to the rules which govern a chancery suit. Therefore, according to the common practice, the District Court was authorized to disregard the findings of the referee entirely, if it saw fit so to do, and proceed *de novo*, or reject them for reasons of law, or refuse to accept them in whole or in part, without assigning reasons therefor. The position of the petitioner in this particular would require this court to be bound conclu-

> sively by the findings by the referee of the preliminary and ultimate facts, although the District Court was not so bound, a proposition which defeats itself on its very face."

The situation really is that there are no findings of fact in the record, that the District Court, which is really in this case the trial tribunal, made no express findings of fact, such findings not being customary in such cases arising in bankruptcy proceedings. The Opinion of the District Judge and the Opinion of the Circuit Court of Appeals may be looked at to ascertain the grounds on which the courts below went, and this Court clearly ought not to disregard the facts on which the District Court and the Circuit Court of Appeals based their Opinions. As the Circuit Court of Appeals said in the Pettingill case,

> "to require this court to be bound conclusively by the findings by the referee of the preliminary and ultimate facts, although the District Court was not so bound, (is) a proposition which defeats itself on its very face."

The findings of fact of the Referee, although this Court should not regard them because they were not followed by the District Court or by the Circuit Court of Appeals, are misleading. For example, the Referee states (page 16) that

> "the debtor was a Massachusetts corporation with a capital of $100,000, $75,000 of which was preferred and $25,000 common stock, upon which a dividend of 3% was declared February 1, 1910, payable May 12, 1910, on the preferred stock."

But of this preferred stock only $16,100 par value was ever issued (Rec. 77) and the dividend actually paid was only $279, and when it was paid the officers of the corporation must have known that the corporation was insolvent, because as of December 31, 1909, the corporation had a

deficit of nearly $45,000. The Referee stated that Swain, an officer of the Collver Company, explained that the losses upon the certificate returned by the corporation to the Massachusetts Commissioner of Corporations "were apparent rather than real, owing to a change in the methods of bookkeeping."

What Mr. Swain stated was not that the losses were not real, but that not all of them were incurred during the year 1909 (Rec. 42). It was conceded by counsel for the Boylston Bank that the deficit shown by this statement was a real deficit (Rec. 42).

The extraordinary statement of the Referee as to the materiality of written statements by a debtor concerning his assets and liabilities has already been discussed.

It is submitted, therefore, that unless under the Bankruptcy Act the Boylston Bank had a right of setoff, the Trustee is clearly entitled to recover the preferences in question. For the debtor, the Collver Tours Company, was deeply insolvent at the time of each payment; the payments that were made were on account of antecedent indebtedness; they were made from the moneys received by the Boylston Bank from the Collver Company within four months prior to the bankruptcy; the payments in question were all made within four months prior to the bankruptcy; and at the time of each payment the Boylston Bank knew, or had reasonable cause to believe, that the effect of each payment would result in a preference to the Boylston Bank over the other creditors of the Collver Company. The admitted result in fact was that the indebtedness of the Collver Company to the Boylston Bank was reduced by these payments

from $25,000 to $2,500 within four months of the bankruptcy.

The fact that no collusion between the depositor and the Bank was established is not of importance. Many, if not most, voidable preferences are neither collusive nor fraudulent.

B.

THE SET-OFF PROVISIONS OF THE BANKRUPTCY ACT OF 1898 ARE NOT APPLICABLE.

For this branch of the argument we assume that each payment or transfer here in question effected a preference and that the Boylston Bank had reasonable cause to believe that each payment or transfer would effect a preference. The Boylston Bank claims, and this is its principal contention in the case, that nevertheless it is entitled to retain the moneys received by it because the transactions were set-offs permitted by law or by the Bankruptcy Act. This contention was apparently upheld by the District Court (Rec. 24) and by the Circuit Court of Appeals (Rec. 194 and 195).

1.

The Bank is not entitled to set-off apart from the Bankruptcy Act.

All the moneys or credits out of which the payments in question were made were deposited or established within four months prior to the bankruptcy, for, as has already been pointed out, it appears that on September 8, 1910, the deposit account of the Collver Tours Company at the Boylston Bank was reduced to $6.23 (Rec. 75), and the

Bank was paid by moneys deposited thereafter and all the payments were made more than two months prior to the bankruptcy, the latest payment in question being on October 14, 1910, and the bankruptcy petition having been filed on December 16, 1910. All the payments were on account of indebtedness existing prior to September 8, 1910. The Bank, it is assumed for this part of our argument, knew, or had reasonable cause to believe, that the payments or transfers would effect preferences.

Whether the rights of the Bank accrued at the times when the moneys were deposited with it or when the transactions were completed by the checks given in payment of the notes held by the Bank, or the book entries in the two cases where no checks were given, it is clear that all the rights of the Bank were gained within four months prior to the bankruptcy and at times when the Bank knew or had reasonable cause to believe that the payments to it would result in preferences.

Within this period of four months prior to the bankruptcy the Bank, knowing, or having reasonable cause to believe, that payments to it would effect preferences, could not by any common law or non-statutory rights obtain payments of antecedent indebtedness which would be valid as against the later appointed Trustee in Bankruptcy of the Collver Tours Company.

2.

The Bank had no rights of set-off under the Bankruptcy Act.

The District Judge felt that he was bound, under the decision of the Circuit Court of Appeals for the First

Circuit, in *Lowell* v. *International Trust Company*, 158 Fed. 781 (1907), to hold that the set-off provisions of the Bankruptcy Act of 1898 were applicable (Rec. 21 and 24). Precisely what ground the Circuit Court of Appeals went on is not wholly clear, but apparently it held that the set-off provisions of the Act were applicable (Rec. 194).

It is important to examine the exact language of the Statute. The only provisions in the Statute as to set-offs are those contained in Section 68, which is as follows:

> "Sec. 68. Set-Offs and Counterclaims. — *a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.
>
> "*b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

a.

The set-off provisions of the Bankruptcy Act are applicable only to set-offs made after a bankruptcy petition has been filed and as of the date of the filing of the petition.

It seems apparent, upon examination of the Statute, that it deals only with cases of mutual debts or credits "between the estate of a bankrupt and a creditor": and it refers to the allowance or payment of the balance

after the account has been stated and one debt set off against another.

The Statute does not refer expressly or by implication to set-offs or mutual debts or mutual credits between the estate of a person not bankrupt and a creditor. It does not purport to deal with set-offs that the parties have made before the petition in bankruptcy has been filed and before any "estate of a bankrupt" has come into existence. It mentions both in paragraph *a* and paragraph *b* the allowance of a set-off after the estate of a bankrupt has come into existence, which cannot be earlier than the filing of a bankruptcy petition.

The word "allowed" used in the Statute is not an apt word to express the legislative sanction of a set-off that may be made between a debtor and a creditor before there has been any bankruptcy petition; but the Statute plainly contemplates the allowance or payment of a set-off or a counterclaim in the bankruptcy proceedings after these proceedings have been instituted. Section 68*b* provides that "a set-off or counterclaim shall not be allowed . . . which is not provable against the estate." Notes which have been paid more than two months before a bankruptcy petition has been filed would not be provable against the estate.

A recent case has pointed out clearly that the time as of which a set-off or a counterclaim must be determined is the date of the filing of the petition. After an involuntary petition had been filed the bankrupt made a deposit with a bank, both the bank and the bankrupt being in ignorance of the pendency of the petition. The bankrupt was then indebted to the bank. The bank claimed to be

entitled to set off its debt against the claim of the estate in bankruptcy of the moneys so deposited, but the learned Court, Hough, J., said, *In re Michaelis & Lindeman*, 196 Fed. at 719 (1912):

> "The statutory direction that the account shall be stated implies that there must be a time when the statement is to be made, and when a final statement of an account is made the account is closed and all mutuality ceases, for the account becomes a statement of balance. In my opinion, therefore, the mutual account between these bankrupts and their bank of deposit was closed by operation of law the moment petition was filed, and any money thereafter intrusted by the bankrupts to the bank was . . . not subject to any set-off existing before petition."

It follows, necessarily, that set-offs made prior to the filing of the petition are not within the provisions of Section 68*a*.

As it is undisputed that the payments in the case at bar, if they were set-offs, were made more than two months prior to the bankruptcy, they are not within Section 68 and it is not claimed that they are permitted by any other provisions of the Bankruptcy Act.

b.

The case of New York County Bank v. Massey is not in point.

This Court has not passed upon the question whether the set-off provisions of the Act are applicable to set-offs made prior to the filing of a bankruptcy petition.

But it will be argued that the present case is con-

trolled by *New York County Bank* v. *Massey*, 192 U. S. 138 (1904). That case, however, involved only set-offs made *after* bankruptcy.

When the petition in bankruptcy was filed the bankrupt had a deposit with the New York County Bank and the New York County Bank held notes of the bankrupt exceeding the deposit. The question involved was whether the Bank could prove its claim on the notes without surrendering the deposit or whether it was entitled to keep the deposit and prove for the balance. This Court held that it was entitled to keep the deposit and prove for the balance.

The grounds of the opinion were that a depositor of money who wants credit in the Bank is not "a transfer of property as a payment, pledge, mortgage, gift or security," and that the deposits were therefore not transferred to the Bank in the sense of being preferences prior to the bankruptcy and that upon bankruptcy the set-off provisions of the Statute became applicable. The Court said:

> "It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate." *New York County Bank* v. *Massey*, 192 U. S. 138, at 148 (1904).

The Court was not dealing with the question of set-offs made before the bankruptcy and there is no suggestion in the Opinion as to the effect of a payment made directly or indirectly to a bank prior to the filing of a petition in bankruptcy against the depositor.

It seems clear that the *Massey* case was correctly decided. It is believed that there is no other decision of this Court which bears upon the qustions involved.

The principle was well stated by the late Judge John Lowell:

> "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor; the law being unwilling that the bank should be called on to pay its debt to the assignee in full and receive only a dividend on the debt due from the bankrupt."
>
> *Ex parte Howard National Bank*, 2 Lowell, 487.

But this principle has no application to set-offs not made by operation of law by the bankruptcy of the debtor, but made by the creditor more than two months prior to the bankruptcy.

The *Massey* case has been followed frequently in cases involving similar facts. See for example:

In re Koenig & Van Hoogenhuyze, 127 Fed. 891 (1904)
In re Scherzer, 130 Fed. 631 (1904).
In re Shults, 132 Fed. 573 (1904).
In re Philip Semmer Glass Co., 135 Fed. 77 (1905).
Tomlinson v. *Bank of Lexington*, 145 Fed. 824 (1906).
Irish v. *Citizens Trust Co.*, 163 Fed. 880 (1908).

In re Perlhefter, 177 Fed. 299 (1910).
Germania Savings Bank v. *Loeb*, 188 Fed. 285 (1911).

It is believed that the *Massey* case has been cited in only two cases in the lower Federal courts, other than the case at bar, as determining that set-offs made prior to the filing of a bankruptcy petition are permitted by Section 68*a* of the Bankruptcy Act.

In re George M. Hill Company, 130 Fed. 315 (1904).
Lowell v. *International Trust Co.*, 158 Fed. 781 (1907).

In the *George M. Hill Company* case the statement of facts is to the effect that:

> "On the second day before the filing of the petition in bankruptcy, and after knowledge of the insolvency of the George M. Hill Company, the bank appropriated the balance in the deposit account standing to the credit of the company, to wit, $3,700.93 and applied it upon the direct indebtedness in the loan account."

As to this the Court said:

> "With respect to the appropriated balance of $3,700.93, it was ruled below that because of the appropriation of that amount was with knowledge of the insolvency of the George M. Hill Company, it was a transfer of property amounting to a preference under Section 60*a* of the Bankruptcy Act of July 1, 1898. It is sufficient to say that the precise question has recently been ruled to the contrary by the Supreme Court in *New York County Bank* v. *Massey*, 192 U. S. 138. In this respect, therefore, the referee and the court were in error."

With deference, it must be pointed out that the statement of the Court in the *Hill Company* case must have been made without an examination of the facts in the *Massey* case, because the set-off in the *Hill Company* case was made prior to the bankruptcy, whereas in the *Massey* case it was made after the bankruptcy. The distinction seems to have been overlooked and was not adverted by the Court.

In the *International Trust Company* case the moneys of a depositor were applied by the Trust Company to the depositor's notes, held by the Trust Company more than two months before the bankruptcy (Rec. 21). The Court was of the opinion, *Lowell* v. *International Trust Company*, 158 Fed. 781, at 783, that there was no substantial distinction between the *International Trust Company* case and the *Massey* case.

The *George M. Hill Company* case and the *International Trust Company* case were both probably decided rightly as the law stood when they were decided. Both were decided before the amendment of 1910. When they were decided the Statute provided that a preference should not be voidable by the trustee unless the creditor "had cause to believe that it was intended thereby to give a preference." In both the *International Trust Company* case and the *George M. Hill Company* case the deposits were applied on the notes held by the Company or Trust Company without the knowledge or consent of the depositor, the debtor. It is difficult to find any intent on the part of the debtor to make a preference in a transaction made without his knowledge or consent.

Other decisions of the lower Federal courts since the

Massey case have pointed out the distinction between the *Massey* case and a case like the case at bar, where a set-off was made prior to the bankruptcy. Thus the court (Ray, J., a Judge with exceptional experience and knowledge in bankruptcy matters) said in *Irish* v. *Citizens Trust Company*, 163 Fed. 880 (1908):

Page 886, —

"If the furniture company (the bankrupt) in due course of business had deposited this money with the trust company, and it or any part of it had remained there, the simple relation of debtor and creditor would have arisen, and in the absence of fraud or collusion or intent to give and receive a preference, there would have been mutual demands which could have been set off, the one against the other, even though the deposits were made within the four months preceding the filing of the petition. *New York Bank* v. *Massey*, 192 U. S. 138. But such is not this case. The furniture company checked out the money, all of it so far as involved here, and by checks on the account transferred it to the trust company as a payment of notes with intent to prefer and it was accepted as payment of such notes."

Page 888, —

"If no checks had been given, if no demand of payment had been made, and all the money had remained with the trust company to the credit of the furniture company, the trust company could have retained of the deposit a sufficient sum to pay all the notes due or not due as against the trustee in bankruptcy."

Page 889, —

"Had they (the deposits) not been applied in execution of that intent to the payment of the $2,000 note not due and the other demand notes, can we say the

> deposits would have remained with the Trust Company so as to have been subject to the right of offset at the time the petition was filed and the adjudication made? Would they not have been applied to the payment of other debts owing to other creditors? Can we construct a right of set-off or lien so called in favor of the Trust Company that never came into existence? This money did not remain on deposit with the Trust Company subject to the check of the (bankrupt) until bankruptcy proceedings were instituted . . . What the situation would have been . . . had not these payments been made is conjectural."

So *In re Perlhefter*, Hand, J., said at page 302, that an objection was made, —

> "First, that the payment was made out of the account in the Fourteenth Street Bank and, therefore, under the case of *N. Y. County Bank* v. *Massey*, could not be a preference, ... As to the first objection, it is sufficient to say that *N. Y. County Bank* v. *Massey* went upon the very theory that the deposit in the bank did not diminish the estate of the depositor, for he had a corresponding property in his claim against the bank. Although the bank has a right upon his insolvency to set off one against the other, that is one thing, and it is another by his voluntary act to lose his control over his deposit and assign it to the Bank. By that act he not only parts with his money, but parts with the corresponding obligation, and forever after puts the property out of his power."

So in *Ridge Avenue Bank* v. *Studheim*, 145 Fed. 798 (C. C. A. 3d, 1906), where a Bank claimed that it had such rights in a customer's deposit that a payment made to the Bank by a check on that deposit could not be a preference, the Court said:

> "This is not the case of a deposit remaining to the credit of a bankrupt's estate at the time of the filing

of the petition in bankruptcy, and which, under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of a portion of the bankrupt's estate by the bankrupt's own act prior to the bankruptcy."

3.

The difference between the present situation and that in the Massey case is not merely a matter of form.

It will doubtless be urged that if the Bank had retained the funds of the Collver Company until the bankruptcy petition was filed, and had not prior to bankruptcy applied them in payment of the notes held by the Bank, the Bank might on the depositor's bankruptcy lawfully so apply them; and that whether the Bank accepted payment prior to bankruptcy, or in the language of the Circuit Court of Appeals (Rec. 195) "delayed all proceedings until the petition in bankruptcy was filed, and thus evidenced a statutory set-off, was purely a matter of form."

The short answer to this argument is that the Bank did not retain the funds but applied them in payment in a manner not authorized by the Bankruptcy Act. The Court cannot "construct a right of set-off . . . that never came into existence."

Irish v. *Citizens Trust Co.*, 163 Fed. 880, 889.

The suggestion that the situation is now the same as if the payments had not been made is not sound.

"What the situation would have been . . . had not these payments been made is conjectural."

Ibid.

It is wholly probable, in view of the Collver Company's condition and the pressing demands upon it in the fulfilment of its contracts (Rec. 24), that the funds would not have remained — or indeed that the funds out of which the later payments were made would not have been deposited.

The fact that a set-off, if made at the time of bankruptcy, would have been lawful is not a reason for upholding a set-off made two months prior to bankruptcy.

The Bankruptcy Act permits banks and others to retain moneys due from them to a bankrupt and held by them at the time of bankruptcy. It does not permit banks or other creditors to obtain preferences two months before bankruptcy.

4.

The payments made by checks were not within Section 68a.

Three of the payments in question were made by checks drawn by the depositor and accepted by the Bank. (*Supra* p. 2.) If the Bank had any lien or any right of set-off, it did not exercise it.

Cf. *Ridge Ave. Bank* v *Studheim*, 145 Fed. 798, 800, (C. C. A. 3d, 1906)
Irish v *Citizens Trust Co.*, 163 Fed. 880, 885, (D. C., N. D., N. Y., 1908)
In re Perlhefter, 177 Fed. 299, 302, (D. C., S. D., N. Y., 1910)

C.

THE DECISION OF THE COURT BELOW SHOULD BE REVERSED.

If the decision below stands as a correct application of the Bankruptcy Act, banks are permitted to receive preferences from their depositors within four months before the filing of bankruptcy petitions against their depositors. That is the necessary effect of the decision. The present case is an illustration. The depositor at the beginning of the period four months before the bankruptcy was insolvent. The Bank had either knowledge of this or notice of facts which would have disclosed it. Within a period four months prior to the bankruptcy the bankrupt made deposits with the Bank. Out of these deposits the Bank was paid more than two months before the bankruptcy.

If a creditor of any other kind, on account of an antecedent indebtedness, with notice of the bankrupt's insolvency, received payments from the bankrupt within four months prior to the bankruptcy, the resulting preferences would undoubtedly have been voidable by the Trustee.

The set-off provisions of the bankruptcy statutes were enacted to enable a creditor to set off demands not due when the bankruptcy proceedings were instituted: for in the absence of such provisions a bank, for example, holding a note not matured at the time of its depositor's bankruptcy would be obliged to surrender the bankrupt's deposit to his trustee and prove its claim *pari passu* with other creditors.

Lowell, Bankruptcy, pp. 188 and 194.

They were not enacted to license banks or other creditors to obtain preferences by transactions completed more than two months prior to bankruptcy.

No decision of this Court and no provision of the Bankruptcy Act requires that the Boylston Bank be permitted to retain the preferences which it has received. The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM H. DUNBAR,
J. BUTLER STUDLEY,
STEWART C. WOODWORTH.

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Trustee.

FILED

MAR 8 1913

JAMES H. MCKENNEY,

Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 995.

J. BUTLER STURGIS, TRUSTEE,

Appellant,

v.

THE BOYLSTON NATIONAL BANK OF BOSTON,

Appellee.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF THE BOYLSTON NATIONAL BANK TO DISMISS APPEAL.

BRADFORD

Supreme Court of the United States.

OCTOBER TERM, 1912, No. 899.

J. BUTLER STUDLEY, TRUSTEE,
APPELLANT,

v.

THE BOYLSTON NATIONAL BANK OF BOSTON,
APPELLEE.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF THE BOYLSTON NATIONAL BANK, APPELLEE, TO AFFIRM DECREE BELOW OR TRANSFER TO SUMMARY DOCKET.

STATEMENT.

The motion of the appellee is that the decree appealed from be affirmed or, in the alternative, that the cause be transferred for hearing to the summary docket of this Court. The appellant does not object to having this cause transferred for hearing to the summary docket of the Court. He does object to having the decree appealed from affirmed under the provision of rule 6, sub-division 5 of this Court, and objects to such affirmance for the following reasons:

1. The cause involves questions which have never been passed upon by this Court.

2. The questions involved are of great practical importance, which deserve the most careful and deliberate consideration of this Court.

3. The amount involved in the cause — $22,500 and interest for more than two years — is such that the cause is of serious importance to the parties.

4. On the facts found by the District Court the result reached is clearly erroneous.

5. The arguments advanced by the Boylston National Bank in support of its motion for affirmance are not well founded.

We shall consider these points summarily in order.

ARGUMENT.

1. *The cause involves questions which have never been passed upon by this Court.*

The question presented to this Court, which has never before been passed upon by this Court, or indeed probably not by any Court except the District Court for the District of Massachusetts and the Circuit Court of Appeals for the First Circuit, is whether the setoff provisions of the Bankruptcy Act are applicable to setoffs which result in preferences and which take place before a bankruptcy petition has been filed, — in this case more than two months before the petition was filed.

The suit is by a trustee in bankruptcy to recover preferences. It is conceded in the appellee's answer (Rec. 8) that the Bank received from the bankrupt within the four months prior to the bankruptcy five payments aggregating $22,500, all these payments being on account

of notes then held by the Bank and due. Three of the payments were made by checks of the Collver Tours Company, the bankrupt, against its deposit account at the Bank. Two of the payments were made by the application by the Bank of funds of the bankrupt then on deposit at the Bank to the credit of the bankrupt.

All the payments in question were made within four months prior to the filing of the bankruptcy petition, and the latest payment in question was made more than two months before the filing of the petition.

The District Judge, after careful consideration of the evidence, was of the opinion (Rec. 23) that the admitted insolvency of the bankrupt at the times when the payments were made, if not known, would have been ascertained by the Bank if the Bank had used reasonable diligence in inquiring as to the financial condition of the Collver Tours Company, and was of the opinion that the Bank had knowledge of facts sufficient to put a reasonable business man on inquiry as to the bankrupt's financial condition.

It was an undisputed fact that the funds out of which the payments in question were made were all deposited within four months prior to the bankruptcy, and at times when the Bank had reasonable cause to believe that the depositor, later bankrupt, was insolvent (Rec. 24).

All the elements of a preference were present: the bankrupt was indebted to the Bank in the sum of $25,000; within four months prior to the bankruptcy the Bank received from the bankrupt payments aggregating $22,500 on account of this indebtedness; the funds out of which these payments were made were all deposited by the bankrupt with the Bank within four months prior to the bank-

ruptcy, and the payments themselves were made all within four months and the latest more than two months before the bankruptcy; the bankrupt was insolvent during the whole of the four months' period and for a long time prior thereto; the Bank had either actual knowledge of this insolvency or knowledge of facts sufficient to have put it on inquiry, and inquiry would have disclosed the insolvency; the necessary effect of the payments was to prefer the Bank over the other creditors of the bankrupt.

The Bank's defence was that the transactions by which it received payment were in reality setoffs of the claims of the Bank against the claims of the bankrupt as depositor against the Bank, and that notwithstanding the facts just stated, the Bank was entitled to retain the payments on the ground that they were authorized by the setoff provisions of the Bankruptcy Act of 1898, Section 68*a*:

> "In all cases of mutual debts and mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Never probably before the decision of the Court below in this case, had it been held that, under the circumstances stated above, a bank was entitled to retain the moneys paid as against the trustee in bankruptcy seeking to recover them. The question is a wholly new one. Of the decisions of this Court *New York County Bank* v. *Massey*, 192 U.S. 138, is the nearest, but that deals with entirely different facts, and the conclusions there reached are not applicable here.

In *New York County Bank* v. *Massey*, 192 U.S. 138, the setoff claimed by the Bank, and decided not to be a preference, was a setoff of moneys *held by the New York County Bank at the time when the petition in bankruptcy was filed.* In *New York County Bank* v. *Massey*, 192 U.S. 138, it was held merely that Section 68*a* of the bankruptcy act of 1898 was applicable to such a situation.

The distinctions between the case at bar and the Massey case are two: In the first place, the transactions to which the Boylston Bank argues that the setoff provisions of the bankruptcy act apply took place in the case at bar more than two months before the bankruptcy, whereas the setoff in the Massey case was a setoff that took place after the petition was filed. This distinction is a vital one because Section 68*a* does not purport to deal with a setoff made before there is any estate in bankruptcy. In the second place, the Massey case arose before the amendment to the bankruptcy act enacted June 25, 1910, Section 11, changing the provisions of Section 60*b* of the Act of 1898 as to the facts which must be proved by the trustee in bankruptcy seeking to set aside a preference, relative to the knowledge of the person receiving preference as to the intention with which the preference was given.

2. *The questions involved are of great practical importance, which deserve the most careful and deliberate consideration of this Court.*

The practical importance of the questions presented in this cause is that they are likely to arise frequently in dealings between banks and their depositors. It is essential that the rights of banks and the rights of their depositors

and all creditors of their depositors should be clearly defined and settled as to this point. The action of many banks, many depositors, and many creditors of depositors would be affected by a decision of this point.

3. *The amount involved in the cause* — $22,500 *and interest for more than two years* — *is such that the cause is of serious importance to the parties.*

4. *On the facts found by the District Court the result is clearly erroneous.*

If the decision below stands as a correct application of the Bankruptcy Act, banks are permitted to receive preferences from their depositors within four months before the filing of bankruptcy petitions against their depositors. That is the necessary effect of the decision. The present case is an illustration. As stated above, the depositor at the beginning of the period four months before the bankruptcy was insolvent. The Bank had either knowledge of this or notice of facts which would have disclosed it. Within a period four months prior to the bankruptcy the bankrupt made deposits with the Bank. Out of these deposits the Bank was paid more than two months before the bankruptcy.

If a creditor of any other kind, on account of an antecedent indebtedness, with notice of the bankrupt's insolvency, received payments from the bankrupt within four months prior to the bankruptcy, there unquestionably would have been reasonable cause to believe that the pay-

ments would result in preferences and they would have been voidable by the Trustee.

But the Bank urged in the Court below, and the Circuit Court of Appeals for the First Circuit ruled, that the setoff provisions of the Bankruptcy Act allowing setoffs between the estate of the bankrupt and a creditor were applicable.

No authority whatever was cited for this proposition except a previous decision of the Circuit Court of Appeals for the First Circuit, *Lowell* v. *International Trust Co.*, 158 Fed. 781. That case arose before the amendment of 1910 and was based, in part at least, upon the fact that the International Trust Company had no notice that any preference was intended.

The Circuit Court of Appeals in the present case stated that it relied upon *New York County Bank* v. *Massey*, 192 U.S. 138, but this Court in the Massey case did not deal with any such question, and of course did not decide or state, even by way of dictum, that the setoff provisions of the Act of 1898 had any application to transactions which took place more than two months before any petition was filed and before on any theory there was any "estate of the bankrupt."

Unless some Act of Congress clearly requires this conclusion that a bank, under circumstances such as these, is entitled to retain preferences, a bank ought not to have rights greater than those of any other creditor, and it is believed that there is no statute which even purports to grant any such privileges to banks.

5. *The arguments advanced by the Boylston National Bank in support of its motion for affirmance are not well founded.*

A. The first ground urged by the appellee, that the trial Court found for the respondent, is insufficient.

It is true that the Referee found for the respondent, but not for the reason stated by the appellee in its brief. The Referee found for the respondent on the ground stated by him (Rec. 19) "that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the Bank amounted to preferences."

The Referee did not rule that the case was governed by *New York County Bank* v. *Massey*. He said that if the case were governed by Section 68 of the act, then the Massey case was applicable, but he did not decide, and was not of the opinion that Section 68 was applicable (see Referee's certificate, Record, page 18).

B. The ground urged by the appellee, that the District Judge found for the respondent, is insufficient.

As we have already pointed out, the District Judge, after careful consideration, reached a conclusion opposite to that of the Referee as to the facts, that is, the District Judge found that the Bank either had knowledge of the admitted insolvency of the depositor, or that the Bank had knowledge of facts sufficient to put a reasonably prudent business man on inquiry, and that such inquiry would have disclosed the depositor's insolvency (Rec. 23).

The District Judge did not rule that *New York County Bank* v. *Massey* was applicable. The District Judge ruled that *Lowell* v. *International Trust Company*, 158 Fed. 781,

was applicable, and as the Lowell case was a case in the Circuit Court of Appeals for the First Circuit, he felt that he was bound to follow it as controlling upon him (Rec. 21). There is nothing in the opinion of the District Judge to indicate that the case was governed by *New York County Bank* v. *Massey*, or that he would not have found for the trustee if he had not felt himself bound by *Lowell* v. *International Trust Company*.

C. The ground urged by the appellee, that the Circuit Court of Appeals found for the respondent, is insufficient.

The Circuit Court of Appeals did hold that the Massey case was controlling. The Court pointed out that the facts in the Massey case were not similar to those in the case at bar, but without satisfactory reasons concluded that the petitioner could not recover.

D. The fact that the deposits were not collusive or fraudulent is immaterial.

It is true that neither the Referee nor the District Judge was of the opinion that the deposits were made with collusive or fraudulent intent. It is also true, and this is the important fact, that the District Judge was of the opinion that the Bank had notice sufficient to put a reasonable business man on inquiry, and that such inquiry would have disclosed to the Bank the admitted insolvency of the debtor, and hence that the payments in question would result in preferences. It is not necessary that a payment be either collusive or fraudulent in order to make it voidable as a preference. Most preferences are neither collusive nor fraudulent.

E. The fact that the case has been tried three times is immaterial.

The case has merely followed the usual procedure in a suit brought by a trustee to recover preferences, tried in the first instance before a Referee in bankruptcy.

The ends of justice in this, as in other cases, require a speedy disposition of the case, and the appellant is quite willing that the cause should be advanced as rapidly as the Court will advance it, but the question ought to be heard and carefully passed upon by this Court for the reasons already given.

The appellant does not ask this Court to review the findings of the trial Court. He asks this Court to accept the findings of the District Judge, and to decide the case on the facts found by the District Judge. The District Judge decided for the respondent and appellee because the District Judge felt himself bound by an earlier decision of the Circuit Court of Appeals for the First Circuit.

The appellant does not question the case of *New York County Bank* v. *Massey*. He contends that it is obvious, as already stated, that *New York County Bank* v. *Massey* is not applicable to the facts here presented.

F. There was "reasonable cause" under Section 11 of the amendment of June 25, 1910.

The appellee argues at some length that the creditor had no reasonable cause to believe that enforcement of the transfers would affect preferences. The appellant does not care to take the time of the Court to argue this point fully at the present occasion. It is sufficient to point out that the District Judge overruled the Referee in this particular, and found that the Bank had knowledge of facts sufficient to put a reasonably prudent business man on inquiry as to the bankrupt's financial condition, and that a reasonably diligent

inquiry would have disclosed to the Bank the admitted fact of its insolvency (Rec., page 23). The facts on which the District Judge based this conclusion are stated by him at length (see pages 23, 24). There is nothing to indicate that the Circuit Court of Appeals did not concur with the conclusions of the District Judge.

The appellant therefore respectfully submits that the decree of the lower Court should not be affirmed, but that the case should stand for hearing, but as the appellant is desirous of having the case disposed of speedily, he does not object to having it transferred to the summary docket.

Respectfully submitted,

WILLIAM H. DUNBAR,
J. BUTLER STUDLEY, *Trustee.*

BRANDEIS, DUNBAR & NUTTER,
Solicitors for Trustee.

Office Supreme Court, U. S.
FILED.
FEB 27 1913
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1912.

No. 899.

J. BUTLER STUDLEY, Trustee,
APPELLANT,

v.

BOYLSTON NATIONAL BANK,
APPELLEE.

Appeal from the United States Circuit Court of Appeals for the First Circuit.

MOTION OF BOYLSTON NATIONAL BANK, APPELLEE, TO AFFIRM THE DECREE BELOW OR TRANSFER TO SUMMARY DOCKET.

HOLLIS R. BAILEY,
Attorney and Counsel for the Appellee,
BOYLSTON NATIONAL BANK.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON, MASS.

Supreme Court of the United States.

October Term, 1912.

No. 899.

J. BUTLER STUDLEY, Trustee,
APPELLANT,
v.
BOYLSTON NATIONAL BANK,
APPELLEE.

Motion of Boylston National Bank, Appellee, to affirm the Decree below or transfer to Summary Docket.

Now comes the appellee, the Boylston National Bank, and moves that the decree of the United States Circuit Court of Appeals for the First Circuit, being the decree appealed from, be affirmed under the provisions of rule 6, subdivision 5, of this Court, on the ground that the appeal is manifestly prosecuted for delay, and the questions involved are too frivolous for further argument; or, if the foregoing relief be not granted, that the cause be transferred for hearing to the summary docket for the reason that the case is of such a character as not to justify extended argument.

For a somewhat fuller statement of the grounds for this motion, reference may be had to the following brief.

BOYLSTON NATIONAL BANK,
Appellee,
By HOLLIS R. BAILEY,
Its Attorney and Counsel.

NOTICE OF MOTION.

To WILLIAM H. DUNBAR,
Attorney and Counsel for the Appellant:

Dear Sir: Please take notice that on Monday, the tenth day of March A.D. 1913, at the opening of the Supreme Court of the United States, or as soon thereafter as counsel may be heard, the foregoing motion will be submitted to the Court. I send you herewith a copy of said motion with a copy of the appellee's brief of argument.

HOLLIS R. BAILEY,
Counsel for
BOYLSTON NATIONAL BANK,
Appellee.

Service of a copy of the above motion and notice accepted this 14th day of February A.D. 1913.

William H. Dunbar

Of Counsel for Appellant,
J. BUTLER STUDLEY,
Trustee.

AFFIDAVIT OF NOTICE.

I, Hollis R. Bailey, attorney and counsel for the Boylston National Bank, the appellee in the above-entitled case of *J. Butler Studley, Trustee*, v. *Boylston National Bank*, No. 899, October Term, 1912, Supreme Court of the United States, being duly sworn, make oath that I served notice of the appellee's foregoing motion, with a copy of its brief of argument, on William H. Dunbar, counsel for the appellant of record in said Court, on

February 14, 1913, being at least three weeks before the time fixed for submitting the motion, by depositing in the mail said notice and brief to the proper address of the said counsel, to be served, duly post-paid, being at such time as to reach him by due course of mail, three weeks before the time fixed by the notice. A copy of said notice, motion, and brief of argument is appended hereto.

Hollis R. Bailey

COMMONWEALTH OF MASSACHUSETTS. 18

SUFFOLK, ss. BOSTON, February ~~15~~, 1913.

Then personally appeared Hollis R. Bailey, and made oath that the foregoing affidavit by him subscribed is true. Before me,

ELLIOTT B. CHURCH,
Notary Public.

Supreme Court of the United States.

October Term, 1912.

No. 899.

J. Butler Studley, Trustee,
Appellant,

v.

Boylston National Bank,
Appellee.

Brief of Boylston National Bank in Support of its Motion to Affirm or Transfer to Summary Docket.

The suit is by a trustee in bankruptcy to recover a preference.

A.

The Trial Court Found for Respondent.

The trial Court (the referee) found and ruled that the case was governed by the rule stated in *New York County Bank* v. *Massey*, 192 U.S. 138, viz., that a bank has a right to apply the deposit of a customer in payment by way of set-off of the customer's overdue note held by it.

The referee says (Record, pp. 17, 18):

"If this case is to be governed by Section 68 of

the act and is the subject of set-off, then it appears to be determined by the cases cited in the brief of learned counsel for the bank,

> *New York County Bank* v. *Massey*, 192 U.S. 138.
> *Demmon* v. *Boylston Bank*, 5 Cush. 194."

The trial Court (the referee) also found as a matter of fact that the respondent, the Boylston National Bank, did not have reasonable cause to believe that the payments made to the bank amounted to preferences.

He says (Record, p. 19):

> "I arrived at the conclusion that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the bank amounted to preferences."

B.

THE DISTRICT JUDGE FOUND FOR RESPONDENT.

The district judge also ruled that the case was governed by —

> *New York County Bank* v. *Massey*, 192 U.S. 138.

The language of the Court (Record, pp. 20, 21) is as follows:

> "On behalf of the bank it is contended, (1) that none of the payments can be considered 'transfers' by the bankrupt of its property, within the meaning of the section referred to; because, in the case

of each, the bank had and properly exercised a right to set-off its claim upon the note against its debt to the bankrupt for the amount then held by it on deposit. (2) That even if the payments be considered 'transfers' within the meaning of Section 60 *b*, and transfers necessarily operating as preferences no reasonable cause on the bank's part to believe that any of the payments would so operate has been proved.

"(1) With regard to the first of these contentions on the bank's part . . .

"In *N.Y. &c. Bank* v. *Massey*, 192 U.S. 138, the set-off claimed by the bank and decided not to be a preference was a set-off of an amount due the bank when the petition was filed on the bankrupt's note then held by it against the amount to the bankrupt's credit in its deposit account when the petition was filed . . . The Court of Appeals for this circuit, however, in *Lowell* v. *International &c. Co.*, 158 F.R. 781, held that a bank which had applied funds in the bankrupt's deposit account to pay demand notes held by it had received no preference, but had lawfully exercised its right of set-off, although its action in thus applying the funds from the deposit account was taken before there were any proceedings in bankruptcy . . . The court was unable to distinguish the case from *N.Y. &c. Bank* v. *Massey* . . .

"I must regard *Lowell* v. *International &c. Co.*, as settling the law for this circuit."

C.

The United States Circuit Court of Appeals Found for the Respondent.

The United States Circuit Court of Appeals also ruled that the case was governed by—

> *New York County Bank* v. *Massey*, 192 U.S. 138.

Putnam, J., says (Record, p. 194):

> "Nevertheless, the circumstances are such that under the amendatory bankruptcy act of June 25, 1910, the rule of this court in *Hardy* v. *Gray*, 144 Fed. Rep. 922, might not apply except for the peculiar circumstances relating to all bank accounts kept in good faith, and the decisions in *New York County Bank* v. *Massey*, 192 U.S. 138 (Jan. 4, 1904) and *Lowell* v. *International Trust Company*, 158 Fed. Rep. 781, decided by this court on December 17, 1907.
>
> "The circumstances in this case may not be in all particulars the same as in the cases cited; but the cases cited make such broad distinctions with reference to going bank transactions that the principles enunciated reach the appeal at bar."

D.

The Deposits were not Collusive or Fraudulent.

The referee, the United States District Court, and the United States Circuit Court of Appeals have all found that the deposits in this case were all made in regular course of business, without any fraudulent or collusive intent (Record, pp. 18, 20, 22).

Mr. Justice PUTNAM says (Record, p. 194):

> "Of course to be within the rule of the cases cited good faith must exist, and there must be no deposits made after insolvency threatens, wholly or especially for the purpose of enabling a bank to secure an advantage over other creditors. *In this case it is plain there was* no such intention; and it is also plain that the deposits were honestly made . . ."

E.

THREE TRIALS ENOUGH.

There have been three trials of the case by different Courts, all upon the merits with all the evidence before each tribunal. The decision in each case was in favor of the bank. The ends of justice require a speedy disposition of the case. This Court, after three trials upon the merits, ought not to be asked to review the findings of fact made by the trial Court who heard the evidence and saw the witnesses, and found for the respondent both upon the facts and upon the law.

A very brief examination of the three opinions rendered by the referee, by the United States District Court, and by the United States Circuit Court of Appeals, respectively, will show that the case is governed by —

New York County Bank v. *Massey*, 192 U.S. 138.

That case has never been questioned, and was cited with approval in —

Newport Bank v. *Herkimer Bank*, 225 U.S. 178.

F.

No Reasonable Cause.

The bank had no reasonable cause to believe a preference would be effected.

If this Court finds that the referee and the district judge and the United States Circuit Court of Appeals were right in their view that the case was governed by

> *New York County Bank* v. *Massey*, 192 U.S. 138, —

then it will not be necessary to proceed further.

If the Court deems it necessary to consider the claim of the trustee that the bank had reasonable cause to believe that a preference would be effected, then we desire to call attention to the following facts shown in the record:

The transactions in question all occurred in regular course while the Collver Tours Company was carrying on its business, and fully expected to continue carrying it on (Record, pp. 18, 83).

After Mr. Collver returned from Europe, September 22, Mr. Swain, the general manager, was asking for an interest in the business as a stockholder, and was fitting up an office for his own use (Record, p. 70). Mr. Collver hoped to get sufficient business in October and November parties, and for January and February parties, so that they would get along without further loans (Record, pp. 82, 83).

Some time in October Mr. Collver and Mr. Swain told the bank officials that they did not want to borrow any money of the bank (Record, p. 107). The Collver Tours Company then had a balance at the bank of nearly $20,000 (Record, p. 159).

The 1909 notes had not been paid because $15,000 of the general-deposit account was taken to enlarge the deposit in the letters-of-credit account; and the company was increasing its business and spending large sums to advertise the Passion Play at Oberammergau (Record, pp. 110, 143, 185).

The bank was informed in writing by Mr. Collver, October 7, 1909, that the Collver Tours Company was not owing any money outside of what it was owing to the bank (Record, pp. 62, 122).

The deposit balances in May and June, 1910, ran over $50,000 for a considerable period (Record, pp. 152, 153), and the "round the world" business in September and October looked very promising (Record, pp. 82, 83).

The company had declared a small dividend in the spring of 1910, payable in May (Record, p. 16).

The bank had granted a line of discount of $25,000, and made loans within that limit without question (Record, pp. 79, 104).

Mr. Swain says the books were very far behind and he had no way of knowing just how they stood (Record, p. 51), and it was some time in November, or shortly before the bankruptcy proceedings, before they were finally cleared up (Record, p. 60):

> "Until the books were closed and a statement taken off, I couldn't know myself what the condition of the business was" (Record, p. 60).
>
> "*Q.* Did you discover, some time in 1910, that the corporation was unable to pay its liabilities? *A.* That wasn't discovered until the bank proceedings.
>
> "*Q.* You mean the assignment? *A.* The assignment" (Record, p. 61).

The bank only knew in a general way about the manner in which the business of the Collver Tours Company was carried on (Record, p. 87).

G.

Conclusion.

The Boylston National Bank respectfully submits that the decree of the lower Court should be affirmed, or else that the case should be transferred to the summary docket for speedy hearing.

HOLLIS R. BAILEY,
For the Boylston National Bank,
Appellee.

Office Supreme Court, U. S.
FILED.
APR 5 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1912.

No. 899.

J. BUTLER STUDLEY, TRUSTEE,
APPELLANT,

v.

BOYLSTON NATIONAL BANK,
APPELLEE.

Appeal from the United States Circuit Court of Appeals for the First Circuit.

Brief of Boylston National Bank, Appellee.

HOLLIS R. BAILEY,
Attorney and Counsel for the Appellee,
BOYLSTON NATIONAL BANK.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON, MASS.

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Supreme Court of the United States.

October Term, 1912.

No. 899.

J. BUTLER STUDLEY, TRUSTEE,
APPELLANT,

v.

BOYLSTON NATIONAL BANK,
APPELLEE.

Brief of Boylston National Bank.

CONCISE STATEMENT OF CASE.

This is a suit by a trustee in bankruptcy to recover alleged preferences amounting to $22,500.

The respondent is a national bank. The bankrupt, The Collver Tours Company, was one of said bank's regular depositors.

The amounts sought to be recovered were received by the respondent in payment of notes of said Collver Tours Company, which had been discounted by said bank in regular course of business.

The notes were all due at the time they were paid. They were all paid by charging the same as off-sets against the amounts due from said bank to said Collver Tours Company on its regular deposit account.

The deposit account had continued for several years

and was at all times a regular general deposit account, subject to check by the Collver Tours Company in ordinary course.

The deposits were all made in the regular course of business and were treated in the regular way. They were all made without any fraudulent or collusive intent. It was the custom of the bank to offset this account with the depositor's notes when they came due, just as it did with all its other customers.

In some instances checks were received from the Collver Tours Company for the amounts of the notes, and in some instances the account was charged with the notes without any checks being received.

It was the regular custom of the bank to charge its customers' accounts with their notes as they matured, whether checks were received or not.

The last note of the Collver Tours Company which was so paid matured and was charged against the account about two months prior to the filing of the petition in bankruptcy. The balance of the account after payment of said note was over $19,000.

ARGUMENT.

A.

The Trial Court Found for Respondent.

The trial court (the referee) found and ruled that the case was governed by the rule stated in *New York County Bank* v. *Massey*, 192 U.S. 138, viz., that a bank has a right to apply the deposit of a customer in payment by way of set-off of the customers' overdue note held by it.

The referee says (Record, pp. 17, 18):

> "If this case is to be governed by Section 68 of the act and is the subject of set-off, then it appears to be determined by the cases cited in the brief of learned counsel for the bank.
>
> *New York County Bank* v. *Massey*, 192 U.S. 138.
>
> *Demmon* v. *Boylston Bank*, 5 Cush. 194."

The trial Court (the referee) also found as a matter of fact that the respondent, the Boylston National Bank, did not have reasonable cause to believe that the payments made to the bank amounted to preferences.

He says (Record, p. 19):

> "I arrived at the conclusion that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the bank amounted to preferences."

B.

THE DISTRICT JUDGE FOUND FOR RESPONDENT.

The district judge also ruled that the case was governed by —

> *New York County Bank* v. *Massey*, 192 U.S. 138.

The language of the Court (Record, pp. 20, 21) is as follows:

> "On behalf of the bank it is contended, (1) that none of the payments can be considered 'transfers'

by the bankrupt of its property, within the meaning of the section referred to; because, in the case of each, the bank had and properly exercised a right to set-off its claim upon the note against its debt to the bankrupt for the amount then held by it on deposit. (2) That even if the payments be considered 'transfers' within the meaning of Section 60 *b*, and transfers necessarily operating as preferences no reasonable cause on the bank's part to believe that any of the payments would so operate has been proved.

"(1) With regard to the first of these contentions on the bank's part . . .

"In *N. Y. &c. Bank* v. *Massey*, 192 U.S. 138, the set-off claimed by the bank and decided not to be a preference was a set-off of an amount due the bank when the petition was filed on the bankrupt's note then held by it against the amount to the bankrupt's credit in its deposit account when the petition was filed . . . The Court of Appeals for this circuit, however, in *Lowell* v. *International &c. Co.*, 158 F.R. 781, held that a bank which had applied funds in the bankrupt's deposit account to pay demand notes held by it had received no preference, but had lawfully exercised its right of set-off, although its action in thus applying the funds from the deposit account was taken before there were any proceedings in bankruptcy . . . The court was unable to distinguish the case from *N. Y. &c. Bank* v. *Massey* . . .

"I must regard *Lowell* v. *International &c. Co.*, as settling the law for this circuit."

C.

The United States Circuit Court of Appeals Found for the Respondent.

The United States Circuit Court of Appeals also ruled that the case was governed by —

New York County Bank v. *Massey*, 192 U.S. 138.

Putnam, J., says (Record, p. 194):

> "Nevertheless, the circumstances are such that under the amendatory bankruptcy act of June 25, 1910, the rule of this court in *Hardy* v. *Gray*, 144 Fed. Rep. 922, might not apply except for the peculiar circumstances relating to all bank accounts kept in good faith, and the decisions in *New York County Bank* v. *Massey*, 192 U.S. 138 (Jan. 4, 1904) and *Lowell* v. *International Trust Company*, 158 Fed. Rep. 781, decided by this court on December 17, 1907.
>
> "The circumstances in this case may not be in all particulars the same as in the cases cited; but the cases cited make such broad distinctions with reference to going bank transactions that the principles enunciated reach the appeal at bar."

D.

The Deposits were not Collusive or Fraudulent.

The referee, the United States District Court, and the United States Circuit Court of Appeals have all found that the deposits in this case were all made in regular course of business without any fraudulent or collusive intent (Record, pp. 18, 20, 22).

Mr. Justice PUTNAM says (Record, p. 194):

> "Of course to be within the rule of the cases cited good faith must exist, and there must be no deposits made after insolvency threatens, wholly or especially for the purpose of enabling a bank to secure an advantage over other creditors. *In this case it is plain there was* no such intention; and it is also plain that the deposits were honestly made . . ."

Concurrent action of two Courts below upon a question of fact will not be disturbed by the upper Court except for manifest error.

First Nat. Bank v. *Littlefield*, 226 U.S. 110.

Evidence.

The evidence is clear and uncontradicted that the deposits were all made in regular course of business without any fraud or collusion.

Herbert B. Bailey, the assistant cashier of the bank, who chiefly attended to the business, testified as follows (Record, p. 92):

> "*X-Q.* 130. Was there any conversation between you and Mr. Collver, or between you and Mr. Swain, in regard to the general deposit account, that the deposits made should be otherwise than in the regular course?
>
> "*A.* Not at all.
>
> "*X-Q.* 131. Or that they should not be subject to check in the regular way?
>
> "*A.* Not for a minute.

"*X-Q.* 132. Was there any understanding of any sort between you and those gentlemen that that account should be other than a general deposit account in the regular course?

"*A.* None, whatever.

"*X-Q.* 133. Or that checks drawn against it should not be honored?

"*A.* There was no such understanding, and every check drawn against it was honored; there was never a check sent back dishonored."

Mr. Frank P. Swain, the assistant manager of the Collver Tours Company, and the man who was attending to the business in Boston, testified (Record, p. 63):

"*X-Q.* 283. The Boylston Bank was the only bank, was it, at which you had a deposit account?

"*A.* Yes.

"*X-Q.* 284. And that was the only bank that was discounting your paper?

"*A.* Yes.

"*X-Q.* 285. And that meant that as your money came in in regular course from different sources, mostly from tours, it was deposited in that bank?

"*A.* Yes.

"*X-Q.* 286. And that continued from first to last, down to the time business stopped in December?

"*A.* Yes."

Leon Collver, the president of the Collver Tours Company, testified (Record, p. 82):

"*X-Q.* 56. Now, so far as you knew and understood, this general deposit account was conducted

in the usual way, deposits made and checks drawn in the usual way?

"*A.* Yes, quite so — knew nothing to the contrary."

Harry W. Cumner, president of the Boylston National Bank, testified (Record, p. 105):

"*Q.* 34. Now I will ask you whether you had any conversation at any time with Mr. Collver or Mr. Swain to the effect that the general deposit account should be anything else than a regular general deposit account, subject to check, in ordinary course?

"*A.* I did not.

"*Q.* 35. Did you have any understanding with them in any way that that account was to be anything other than a regular deposit account subject to their checks?

"*A.* No, sir, I did not."

E.

Set-Off.

Where a bank receives deposits in regular course of business subject to check without collusion or fraud, and holds notes signed by the depositor, it has a right, when the notes are due, to offset the amounts due to it on the notes against the amounts due from it on the deposit account.

The right of set-off exists under the Bankrupt Act, sec. 68, and also exists apart from the Bankrupt Act.

This right exists even if the depositor is insolvent

when the notes become due and even if such insolvency is known to the bank.

Demmon v. *The Boylston Bank*, 5 Cush. 194.
New York &c. Bank v. *Massey*, 192 U.S. 138.
In re Scherzer, 130 Fed. Rep. 631.
Lowell v. *International Trust Co.*, 158 Fed. Rep. 781.
In re Percy Ford Co., U.S. Dist. Ct. for Mass. (Dec. 1911).
Whitaker v. *Crowder State Bank*, 26 Okla. 786.
Tomlinson v. *Bank of Lexington*, 145 Fed. Rep. 826.
Chicago Title &c. Co. v. *Federal &c. Bank*, 192 Fed. Rep. 967.
Germania Savings Bank v. *Loeb*, 188 Fed. Rep. 285.
West v. *Bank of Lahoma*, 16 Okla. 328.
Frank v. *Mercantile Nat. Bank*, 182 N.Y. 264.
Irish v. *Citizens Trust Co.*, 163 Fed. Rep. 880.
Booth v. *Prete*, 81 Conn. 636.
In re George M. Hill Co., 130 Fed. Rep. 315.
In re Philip Semmer Glass Co., 135 Fed. Rep. 77.
In re Myers, 99 Fed. Rep. 691.
In re Little, 110 Fed. Rep. 621.
In re Medaris-Vine Carriage Co., 17 Am. B.R. 897.

Jordan v. *Nat. Shoe & Leather Bank*, 74 N.Y. 473.

Pearsall v. *Nassau Nat. Bank*, 74 App. Div. (N.Y.) 89.

Steinhardt v. *Nat. Park Bank*, 120 App. Div. (N.Y.) 255.

Clark v. *Northampton Nat. Bank*, 160 Mass. 26.

Wiley v. *Bunker Hill Nat. Bank*, 183 Mass. 495.

Furber v. *Dane*, 203 Mass. 117.

Knapp v. *Cowell*, 77 Iowa, 528.

Newport Bank v. *Herkimer Bank*, 225 U.S. 178.

F.

SET-OFF PRIOR TO BANKRUPTCY.

The right of set-off prior to bankruptcy was recognized and allowed in the following cases, which were all cases in bankruptcy:

In re George M. Hill Co., 130 Fed. Rep. 315, 318.

Lowell v. *International Trust Co.*, 158 Fed. Rep. [illegible].

In re V. & M. Lumber Co., 182 Fed. Rep. 231, 237.

Chicago Title &c. Co. v. *Federal &c. Bank*, 192 Fed. Rep. 967, 975.

In re Medaris-Vine Carriage Co., 17 Am. B.R. 897, 900.

Booth v. *Prete*, 81 Conn. 636.

West v. *Bank of Lahoma*, 16 Okla. 328.

G.

Checks.

The fact that checks were given in certain instances in connection with the payment of the notes is not material.

The right of set-off which the bank had was not destroyed or diminished by the giving of the checks. The result accomplished was precisely the same in the one case as in the other.

The checks were given by the depositor for its own convenience.

Irish v. *Citizens Trust Co.*, 163 Fed. Rep. 880, 888.

In re Lynn Camp Coal Co., 168 Fed. Rep. 998.

H.

The Opinion of District Judge.

The opinion of the district judge is not a part of the record.

North Am. Loan & Trust Co. v. *Colonial &c. Co.*, 83 Fed. Rep. 796, 803.

England v. *Gebhardt*, 112 U.S. 502.

Williams v. *Norris*, 12 Wheat. 117.

Rector v. *Ashley*, 6 Wall. 142.

An opinion does not take the place of findings of fact.

In re Pettingill & Co., 137 Fed. Rep. 840.

Recourse can not be had to the opinion to ascertain the facts.

Townsend v. *Beatrice Cem. Ass'n*, 138 Fed. Rep. 381.

Chapman v. *Bowen*, 207 U.S. 89.
In re Boston Dry Goods Co., 125 Fed. Rep. 226, 229.

It follows from the foregoing that the statements of fact contained in the opinion of the district judge can not properly be allowed to control the findings of fact made by the referee, which are a part of the record.

The referee, in his certificate, has found the facts in favor of the respondent (Record, pp. 15–19). He says:

> "I arrived at the conclusion that the complainant has not established the element of a reasonable cause to believe that the effect of the payments made to the bank amounted to preferences" (Record, p. 19).

I.

No Reasonable Cause.

The bank had no reasonable cause to believe a preference would be effected.

If this Court finds that the referee and the district judge and the United States Circuit Court of Appeals were right in their view that the case was governed by

New York County Bank v. *Massey*, 192 U.S. 138,—

then it will not be necessary to proceed further.

If the Court deems it necessary to consider the claim of the trustee that the bank had reasonable cause to believe that a preference would be effected, then we desire to call attention to the following facts shown in the record:

The transactions in question all occurred in regular

course while the Collver Tours Company was carrying on its business, and fully expected to continue carrying it on (Record, pp. 18, 83).

After Mr. Collver returned from Europe, September 22, Mr. Swain, the general manager, was asking for an interest in the business as a stockholder, and was fitting up an office for his own use (Record, p. 70). Mr. Collver hoped to get sufficient business in October and November parties, and for January and February parties, so that they would get along without further loans (Record, pp. 82, 83).

Some time in October Mr. Collver and Mr. Swain told the bank officials that they did not want to borrow any money of the bank (Record, p. 107). The Collver Tours Company then had a balance at the bank of nearly $20,000 (Record, p. 159).

The 1909 notes had not been paid because $15,000 of the general-deposit account was taken to enlarge the deposit in the letters-of-credit account; and the company was increasing its business and spending large sums to advertise the Passion Play at Oberammergau (Record, pp. 110, 143, 185).

The bank was informed in writing by Mr. Collver, October 7, 1909, that the Collver Tours Company was not owing any money outside of what it was owing to the bank (Record, pp. 62, 122).

The deposit balances in May and June, 1910, ran over $50,000 for a considerable period (Record, pp. 152, 153), and the "round the world" business in September and October looked very promising (Record, pp. 82, 83).

The company had declared a small dividend in the spring of 1910, payable in May (Record, p. 16).

The bank had granted a line of discount of $25,000,

and made loans within that limit without question (Record, pp. 79, 104).

Mr. Swain says the books were very far behind and he had no way of knowing just how they stood (Record, p. 51), and it was some time in November, or shortly before the bankruptcy proceedings, before they were finally cleared up (Record, p. 60):

> "Until the books were closed and a statement taken off, I couldn't know myself what the condition of the business was" (Record, p. 60).
>
> "*Q.* Did you discover, some time in 1910, that the corporation was unable to pay its liabilities?
>
> "*A.* That wasn't discovered until the bank proceedings.
>
> "*Q.* You mean the assignment?
>
> "*A.* The assignment" (Record, p. 61).

The bank only knew in a general way about the manner in which the business of the Collver Tours Company was carried on (Record, p. 87).

J.

Conclusion.

The Boylston National Bank respectfully submits that the decree of the lower Court should be affirmed.

HOLLIS R. BAILEY,
For the Boylston National Bank,
Appellee.

STUDLEY, TRUSTEE IN BANKRUPTCY OF COLLVER TOURS COMPANY *v.* BOYLSTON NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 899. Argued April 14, 1913.—Decided June 9, 1913.

Nothing in the Bankruptcy Act deprives a bank with which the insolvent is doing business of the rights of any other creditor taking money without reasonable cause to believe that a preference will result.

In this case it having been found that the deposits and payments of notes were not made to enable the bank to secure a preference by the right of set-off, the bank had a right under its agreement to set off the deposits against the notes within four months of the bankruptcy. *New York County Bank* v. *Massey*, 192 U. S. 138.

Section 68a of the Bankruptcy Act did not create the right of set-off but recognized its existence and provided a method for its enforcement even after bankruptcy.

The right of set-off is recognized by the Bankruptcy Act and it cannot be taken away by construction because of possibility of its abuse; nor will the act be so construed by denying such right as to make banks hesitate to carry on business and thus produce evils of serious consequence.

200 Fed. Rep. 249, affirmed.

THE facts, which involve the right of a bank to accept in good faith payments from an insolvent, are stated in the opinion.

Mr. J. Butler Studley, with whom *Mr. William H. Dunbar* and *Mr. Stewart C. Woodworth* were on the brief, for appellant.

Mr. Hollis R. Bailey for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Collver Tours Company was engaged in the business of conducting touring parties around the world, charging

a lump sum for the tickets, which were paid for in advance. It had expended about $40,000 in advertising, which it carried on its books as an asset, and since the character of its business did not involve the possession of tangible property, it had nothing except cash on hand, good-will and its earning capacity as a means of paying debts.

In 1907 the company opened an account with the Boylston National Bank, with which it subsequently did all of its banking business of depositing, checking and borrowing. It notified the Bank in 1909 that it had no other liabilities except what was due to the Bank, and it was given a line of credit of $25,000. It borrowed that sum on the promise to repay it that year, but as it used a part of its funds to open a Letter-of-Credit Account in the Bank, it was permitted to renew the notes. In December, 1909, it made a statement to the Massachusetts Corporation Commission which showed that the company did not have assets sufficient to pay its liabilities, and an officer of the Bank saw this statement, but the representative of the Collver Company went over the matter with the bank officers, made an explanation and borrowed an additional sum of $5,000 in the spring or summer of 1910. During the year 1910 the debt of $25,000 was reduced to $10,000, went back to $25,000, was reduced again to $15,000 and increased to $30,000—the Collver Company making to the Bank encouraging statements of its prospects and of an anticipated large sale of tickets for round-the-world tours. One note for $5,000 was paid and the then debt of $25,000 was represented by five notes for $5,000 each, maturing Sept. 12, 20, 30, Oct. 3 and 14th.

The balances in bank to the credit of the Collver Company fluctuated greatly from time to time, varying from almost nothing up to as high as $54,000. As a result of sales of tickets, the company deposited large sums in August and September and smaller sums in October and November. During that period $22,500 was paid to the

Bank, the three notes due September 12, 20 and 30 being paid by checks on the Boylston National Bank. The note for $5,000 due Oct. 3, was charged to the Company's account and on the same day a renewal note for $2,500 was discounted. The note for $5,000 which fell due on October 14 was also charged to the deposit account according to the custom of the Bank, of which the Collver Company had notice and to which it assented. On the date of the payment by such charging of the last note to the account the Company had $19,000 left to its credit. The Collver Company continued to make deposits and to draw checks, and applied for a new loan, which was refused by the Bank. On Dec. 16, 1910, a petition in bankruptcy was filed against the Company and after his election the Trustee brought suit against the Bank to recover the $22,500, claiming that it had notice of the Collver Company's insolvency and that the payments of $22,500 were transfers which had operated to give the Boylston Bank a preference within four months of filing the petition.

In its answer the Bank alleged that it was informed and believed that the Company was doing a large and constantly increasing business and was in every way responsible; that the Company for a long time kept its general deposit with the Bank and was constantly making deposits therein, some large, some small, upon all of which the Bank had a lien and a right of set-off and that "this right of set-off was not affected by the fact, if it be a fact, that the Company was at any of the times of the exercise of said right of set-off, insolvent;" and it claimed that the exercise of its right of set-off did not and could not constitute a preference within the meaning of the Bankruptcy Act or any amendment thereto.

The case was tried by the Referee, who sustained the Bank's claim of set-off, holding that the payments were not transfers; or,—if transfers—that the Trustee could not

recover the money because the bank had no reasonable cause to believe that the payment of the notes would operate as a preference. On exceptions to the report it was sustained on the ground that the deposits had been honestly made in due course of business and that the defendant, by virtue of its banker's lien and right of set-off, could retain the money. That judgment was affirmed on the same ground by the Circuit Court of Appeals. (200 Fed. Rep. 249.) The case was then brought here by the Trustee, who insists that all the payments were transfers;—that if the notes charged to the account are not transfers certainly the giving of the three checks for $5,000 were transfers and that in receiving the same the Bank necessarily knew that it was obtaining a preference.

But if, as found by the Referee, the Bank had no reasonable cause to believe such transfers would effect a preference, the payments by checks for $15,000 drawn on the deposit account, are as much protected as if on the same dates similar checks had been given in payment of like amounts due another bank with which the Collver Company kept no account. For there is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The Bankruptcy Act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing in trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues all payments thus made, within the four months period, may be recovered by the Trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected.

In this case the Referee found as a fact that the Bank

had no reasonable cause to believe that a preference would result. The District Judge made no finding of fact, though in his opinion, which cannot be considered as a finding of fact, he did state that the Bank had a right to examine the company's books and could have discovered that a preference would result. The Circuit Court of Appeals made no ruling on this subject, and we, therefore, pass to the consideration of the right of set-off in the light of the finding by the Referee, by the District Judge, and by the Court of Appeals that the deposits were honestly made in due course of business and without any intent to prefer the Bank.

The money so deposited was the proceeds of the sale of tickets to a large party of round-the-world tourists and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the Bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the Bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in *New York County National Bank* v. *Massey*, 192 U. S. 138, where $3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him was allowed to the Bank by way of set-off on notes of the bankrupt held by it.

An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed,—while in the *Massey Case* the Trustee, under the supervision of the Referee stated an account and allowed the set-off as permitted by § 68a, which provides "that in all cases of mutual debts, or mutual credits be-

tween the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

That section did not create the right of set-off but recognized its existence and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off, is a right given or recognized by the commercial law of each of the States and is protected by the Bankruptcy Act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

The banker's lien on deposits, the right of retention and set-off of mutual debts are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, to avoid a circuity of action, may interpose his mutual claim by way of defense and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaims can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the Trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the Trustee. But there is nothing in § 68a which prevents the parties from volunta-

rily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

The Bank was indebted to the Collver Company as a depositor some $54,000 for money deposited in good faith in the usual course of business and with no purpose of enabling the Bank to secure the right of set-off. The Collver Company, on the other hand, was indebted to the Bank $25,000 on notes maturing at various dates. These were mutual debts, and if on the date the first note became due, the Collver Company had failed to pay it, the Bank could have enforced its banker's lien or its right of set-off, by applying $5,000 of the deposits in payment of the note which matured that day, and so on as each of the other notes became due. It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14 to do what the law would have required the Trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for $5,000 were paid or notes for $5,000 were charged, was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off.

The Bankruptcy Act recognizes this right and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the Trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence.

Affirmed.